79-1624

Supreme Court, U.S.
FILED
APR 16 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1979
No.

LOCAL 450, UNITED FURNITURE WORKERS OF AMERICA, AFL-CIO,

Petitioner,

v.

DONN PRODUCTS, INC., and AMERICAN METALS CORP.,

and

NATIONAL LABOR RELATIONS BOARD,

Respondents.

PETITION (WITH APPENDIX) FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

James F. Gill
230 Park Avenue
New York, New York 10017
Attorney for Petitioner

Robinson, Silverman, Pearce,
Aronsohn & Berman
Michael F. O'Toole
Andrew Irving
Of Counsel

(9676)

I N D E X

Page

Opinions Below..... 2

Jurisdiction..... 2

Questions Presented..... 3

Questions Presented..... 3

Statutes Involved..... 4

Statement of the Case.... ... 6

Reasons for Granting the Petition..... 19

Conclusion..... 47

Appendix

Decision of the Court of Appeals..... A1

Decision and Order of the National Labor Relations Board..... A10

Judgment of the Court of Appeals..... A82

C I T A T I O N S

Amalgamated Cloth. Workers of America v. N.L.R.B., 174 U.S. App. D.C. 20, 527 F.2d 803 (1975), cert. denied sub nom. Jimmy-Richard Co. v. N.L.R.B. 426 U.S. 907 (1976)..... 36

American Federation of Labor v. N.L.R.B., 308 U.S. 401 (1940)..... 30

Axton Candy & Tobacco Co., 241 NLRB No. 163 (1979)..... 36

Bandag, Inc. v. N.L.R.B., 583 F.2d 765 (5 Cir. 1978)..... 23

Curlee Clothing Co. v. N.L.R.B., 607 F.2d 1213 (8 Cir. 1979)..... 23, 24

E.S. Merriman & Sons, 219 NLRB 972 (1975), mod. sub nom. N.L.R.B. v. E.S. Merriman & Sons, No. 75-3731, 99 LRRM 2634 (9 Cir. 1978)..... 39

F.T.C. v. Sperry and Hutchinson Co., 405 U.S. 233 (1973)..... 50

Gibson Products of Washington Parish, La., 185 NLRB 362 (1970)..... 24, 25

Hedstrom Co. v. N.L.R.B., 558 F.2d 1137 (3 Cir. 1977)..... 23, 49

International Manufacturing Co., 238 NLRB No. 190 (1978)..... 24

Leedom v. Kyne, 358 U.S. 184 (1958)..... 30

Local Union No. 2338, Int. Bro. of Electrical Workers v. N.L.R.B., 162 U.S. App. D.C. 406, 499 F.2d 542 (1974)..... 41

N.L.R.B. v. American Cable Systems, Inc., 427 F.2d 446 (5 Cir.), cert. denied 400 U.S. 957 (1970)..... 23,24

N.L.R.B. v. Central Machine & Tool Co., 424 F.2d 542 (10 Cir. 1970), cert. denied 407 U.S. 910 (1972)..... 45

N.L.R.B. v. Coca-Cola Bottling Co. of San Mateo, 472 F. 2d 140 (9 Cir. 1972)..... 24

N.L.R.B. v. Copps Corp., 458 F.2d 1227 (7 Cir. 1972)..... 39

N.L.R.B. v. East Side Shopper, Inc., 498 F.2d 1334 (6 Cir. 1974). 34

N.L.R.B. v. General Stencils, Inc., 438 F.2d 894 (2 Cir. 1971)..... 50

N.L.R.B. v. Gissel Packing Co., 395 U.S. 575 (1969)..... 19,20,21, 25,26,27, 29,30,31, 35,36,44, passim

N.L.R.B. v. Henry Colder Co., 447 F.2d 629 (7 Cir. 1971) 23

N.L.R.B. v. Matouk Industries, Inc., 582 F.2d 125 (1 Cir. 1978)..... 45

N.L.R.B. v. Pacific Grinding Wheel Co., Inc., 572 F.2d 1343 (9 Cir. 1978)..... 44,45

N.L.R.B. v. Walton Manufacturing Co., 369 U.S. 404 (1962)..... 41

Russell-Newman Mfg. Co., 407 F.2d 247 (5 Cir. 1969) 45, 46

Securities and Exchange Com. v. Chenery Corp., 318 U.S. 80 (1943)..... 50

Universal Camera Corp. v. N.L.R.B., 340 U.S. 474 (1951)..... 40, 44

Vermont Yankee Nuclear Power v. Natural Resources Def. Council, 435 U.S. 519 (1978)..... 32

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

LOCAL 450, UNITED FURNITURE WORKERS OF AMERICA, AFL-CIO,

Petitioner,

v.

DONN PRODUCTS, INC., and AMERICAN METALS CORP.,

and

NATIONAL LABOR RELATIONS BOARD,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The petitioner, Local 450, United Furniture Workers of America, AFL-CIO ("the Union"), prays that a writ

of certiorari be issued to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in this case on January 17, 1980.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 613 F. 2d 162. The decision and order of the National Labor Relations Board ("the Board") are reported at 229 NLRB No. 9.

JURISDICTION

The decision and judgment of the Court of Appeals were entered January 17, 1980 and are reproduced in the Appendix to this Petition at pp. A1-A9, A82-A83.* The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

---

* References to the Appendix are set forth hereafter as "(A)."

QUESTIONS PRESENTED

1. Whether a Court of Appeals may refuse to enforce an order of the Board directing an employer to bargain with a union whose majority status was destroyed by pervasive unfair labor practices simply because the employer discontinued its unlawful activity during the several years between the representation election tainted by the unfair labor practices and the judgment of the Court of Appeals?

2. Whether a Court of Appeals may ignore both the Board's expertise in the field of labor relations and the "substantial evidence" test by brushing aside the identifiable and specific portions of an employer's speech to employees relied upon by the Board in the Board's finding that the speech was a coercive and threatening unfair labor practice?

3. Whether, when a remedial bargaining order by the Board is based on numerous unfair labor practices, a Court of Appeals which disagrees with the Board as to only one of those unfair labor practices may usurp the Board's role and impose a different remedy without remanding the matter to the Board for consideration of the proper remedy?

STATUTES INVOLVED

The relevant provisions of the National Labor Relations Act, 49 Stat. 449 (1935), as amended, 29 U.S.C. §151 et seq., are as follows:

Sec. 7. Employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or

other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

Sec. 8. (a) It shall be an unfair labor practice for an employer--

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

STATEMENT OF THE CASE

This case was before the Court of Appeals upon petition of Donn Products, Inc., and its wholly-owned subsidiary, American Metals Corporation (hereinafter referred to jontly as "the Company") for review of the order of the Board, and upon the Board's cross-application for enforcement. The Court of Appeals has jurisdiction of the proceedings under Section 10(e) and (f) of the Act.

Factual Background

The Union began its organizational drive among the Company's employees in March 1975.[1] The Company is engaged in the processing and production of ceiling and partition systems in the

1. All dates are 1975, unless otherwise indicated.

Cleveland, Ohio area. When the organizational campaign began, the Company operated out of three production facilities.

By July 9, the Union had obtained valid authorization cards from 156 of the 288 employees in the unit[2] on that day. The Union demanded that the Company recognize and bargain with it as representative of the employees, but the Company refused to do so. In August, the Union petitioned the Board for an election pursuant to Section 9 of the Act.

2. The unit included

> "All production and maintenance employees, including shipping and receiving employees, plant janitor, the paint technician, the chief inspector, assistant foremen, leadmen and probationary or production trainee employees of the [Company] at its two facilities . . . excluding office clerical employees, technical employees, engineers and draftsmen, production clerk, foremen, and all professional employees, guards, and supervisors as defined in the Act."

The election was held on September 10, and the Union failed to obtain a majority of the votes -- 115 ballots were cast for the Union, against 148 for the Company.

The Union timely filed objections to the election and, at approximately the same time, unfair labor practice charges against the Company. Following a consolidated hearing on the objections and unfair labor practice charges, the Administrative Law Judge ("ALJ") issued his Decision and Recommended Order on October 18, 1976. (A35-A81).

The ALJ Decision

The ALJ found that the Company had committed the following unfair labor practices in violation of Section 8(a)(1) of the Act:

Granting and promising benefits to encourage abandonment of the Union

The Company instituted an unprecedented arbitration procedure for the resolution of employee grievances. Announced in June, the new procedure went into effect in August, a month before the election, and after the Union demanded recognition. (A45-A46).

Also in August, the Company began a new program of assisting employees in obtaining bank loans. (A46-A47).

Late in August, the Company distributed a 14-page pamphlet which included a promise to establish a new, more advantageous bonus system. (A48-A50).

On September 8, only two days before the election, the Company's president promised to explore the possibility of instituting a dental insurance program. (A50).

Threat to close the Berea production facility

In a speech to employees at the Berea location on September 5, only five days before the election, the Company president, in a generally anti-union speech, threatened to exercise his managerial perogative to close the plant. The ALJ credited an employee's testimony quoting the president as saying, "he could take the company and move it anywhere he pleases at any time," "he could just take off and move the company anywhere he chooses at any time." (A50-A52).

Threats and Interrogation

On several occasions, Company supervisors threatened employees with discharge and criminal prosecution, and interrogated them about their union

activity and the activities of others. (A52-A58).

On the basis of these findings, the ALJ recommended entry of a cease and desist order directed at these unfair labor practices. In addition, he recommended that the results of the election be set aside, and a new election held.

The Board's Decision

The Company, the Union, and the Board's General Counsel filed exceptions and cross-exceptions to the ALJ's decision. In its April 20, 1977 Decision and order (A10-A34), the Board affirmed all of the findings of Section 8(a)(1) violations described above. The Board particularly noted that the Company president's "talk about [the Company's] ability to move the plant wherever it wanted constituted a threat of economic

reprisal in the event the Union won the election." (A12).

The Board went on to reverse the ALJ and find that, in a speech to employees on September 8, two days before the election, the Company's president had threatened to engage in sham bargaining in the event the Union won the election. (A17). While the ALJ had considered and rejected this allegation (A58-A60), his decision made absolutely no reference to the existence of a transcript of the speech which was admitted into evidence. The Board rejected the ALJ's characterization of the evidence of the speech as "nebulous, vague, [and] indirect" (A13) and quoted extensively from the transcript apparently ignored by the ALJ. It is worthwhile to reproduce here the portions of the speech quoted by the Board (A14-A17):

"As I mentioned to you before, I am not inclined to be forced to do anything. It is a free country, I am a free man, and I believe that I ought to be able to do what I believe I have to do and, that is, I'll bargain; but it's like leading a horse to water. When he's got his head under water, you don't know for sure he is drinking, but then you've got to practically drown the horse before he drinks enough water, before you bring him out.

"So this is how the battle starts . . . .

* * *

"The length of negotiations has to do with how long do you hold the horse's head under the water. Finally, he wants a drink of water and he comes up, so he talks for a little bit, a little while, and goes back and forth. And, as I pointed out, a lot of it is for show.

* * *

". . . [I]f I decide I'm not going to do something and it doesn't matter what it is, there's no law in this country that says I have to.

"So then we start down the line: 'How far are we going to carry this out?' Well, this is

what happens--it's very simple--we react the point of impasse. That's really easy to reach, a point of impasse.

"You say, 'Well, you got to keep talking,' and you've got to keep talking and negotiating with the union or you've got to be continuing to negotiate in what they call good faith. I am an expert. That is negotiating in good faith, because all you've got to do, I am sure, is keep talking and keep talking and keep saying no until finally you all decide to go on and step outside and stand outside the same stake that this union is trying to get in, but now my employees step out and join them and they stand out there, outside of that stake. [Emphasis supplied.]

"Don't forget. You can't step on our front lawn, and we'll put up a few more stakes to be sure that our own employees don't come back in again, because then you are on strike it's no longer your company, it's not your company any more. You have decided that you are going to go somewhere else and you won't come back to work unless you get whatever your demand is.

* * *

"Well, how do you cause the company to hurt? You try and get

even with us for not negotiating as much as you think you would like to have and, therefore, you go out on strike, and you step out, pick up your signs, and there you are.

"Now, it's very simple. When are you going to come in? We'll come in when our demands are met. [Emphasis supplied.]

"'When are your demands met?' You know I am going to have to be the one to meet them. So, now time goes by and the talk behind the scenes naturally is, 'I wonder when they are going to be tired of losing money by sitting out there and wanting to come in, and how much do they think they are going to get?' And all these favoritisms and all these other little things that you are talking about, and some of them are pretty small, how long are you going to stay out there? Well, it's your guess; it's my guess." [3]

Based upon its analysis of the speech, the Board ruled that only two days before the election, the Company "conveyed to employees the futility of choosing union representation and presented them with

---

3. All emphases supplied by the Board.

only a choice between striking and no union". (A17) The speech therefore constituted unlawful restraint and coercion, violative of §8(a)(1).

The Board also reversed the ALJ's choice of remedy, finding that "there is little or no likelihood that a second and fair election could be conducted in the face of the Company's far-reaching unfair labor practices . . . . " The Board catalogued the various unfair labor practices committed by the Company and found, without emphasizing any particular one over the others, that they "were intended to, and did in fact, undermine the Union's majority strength." On this basis, the Board directed entry of a bargaining order, and found that the Company violated §8(a)(5) of the Act by refusing to recognize and bargain with

the Union as of July 9. In connection with the bargaining order, the Board directed the Company to rescind the arbitration procedure and loan assistance programs instituted after that date. Finally, the Board directed the Company to bargain with the Union over both its decision to close the Berea Plant in December and the effects thereof.

The Court's Decision

The Court of Appeals affirmed all of the Board's §8(a)(1) findings except for the threat to refuse to bargain in good faith. Citing a few passages from the speech different from those relied upon by the Board, the Court held that the speech could not "be considered an advance threat not to bargain in good faith . . . . " (A5). The

Court also declined to enforce the Board's bargaining order, giving three separate reasons. First, the Court held that none of the violations "are of a continuing nature." (A7). Second, the Court ruled that the effect of the violations "would quickly dissipate." (A8). Third, the Court deemed it "clear that the [bargaining order] was determined to a large extent by the finding that there had been a threat of sham bargaining." (A8-A9). Since this finding had been overruled, the basis for the bargaining order had been eliminated, according to the Court.

Petitioner asks that this Court grant certiorari to review three aspects of the lower court's decision: its refusal to enforce the Board's bargaining order, its rejection of the

Board's finding that the employer engaged in sham bargaining, and its failure to remand the case to the Board for reconsideration of the proper remedy.

REASONS FOR GRANTING THE PETITION

I

THE COURT BELOW HAS SEVERELY RESTRICTED THE AVAILABILITY OF BARGAINING ORDERS IN A MANNER CONTRARY TO THE TEACHINGS OF THIS COURT, OTHER COURTS OF APPEAL, AND THE BOARD.

The present case requires this Court's intervention in order to repair serious damage done to this Court's mandate in NLRB v. Gissel Packing Co., 395 U.S. 575 (1969) and eliminate a serious dispute which has developed between several of the courts of appeal and the Board. In Gissel, the Court gave

its unequivocal approval to the use of a bargaining order to remedy unfair labor "practices [which] have the tendency to undermine [a union's] majority strength and impede the election processes." 395 U.S. at 614. Imposition upon an employer of the obligation to bargain with a union whose provable majority was lost by the time of a representation election through the employer's unlawful acts "is designed as much to remedy past election damage as it is to deter future misconduct." Id. at 612 (footnote omitted). The bargaining order thus serves two distinct purposes.

> "[E]ffectuating ascertainable employee free choice becomes as important a goal as deterring employer misbehavior." Id. at 614.

This Court thus sanctioned the bargaining order as an alternative to the traditional remedies of a cease and

desist order and the posting of an appropriate notice. The Court also identified the body which would choose the correct remedy:

> "It is for the Board and not the courts, however, to make that determination, based on its expert estimate as to the effects on the election process of unfair labor practices of varying intensity." 395 U.S. at 612 n.32.

The decision by the lower court in the present case is perhaps the latest salvo in an ongoing battle between several of the courts of appeal and the Board concerning the proper timeframe for evaluating the need for a bargaining order. The Court of Appeals criticized the Board for having "made no findings or detailed analysis as to the residual impact or continuing effect . . . of the unfair labor practices." (A8) (emphasis supplied). The Court concluded,

> "It has now been four years since the election was held. We believe the purposes of the Act will be best served by an early rerun election." (A9).

The basis of the Court's challenge to the Board's choice of remedy lies in its conclusion that the contemporary effects of the unfair labor practices as of the time of the court's decision are dispositive of the issue of remediation. The Sixth Circuit here held that although the threat of a plant closure is a severe unfair labor practice which ordinarily would require a bargaining order, no bargaining order is necessary because of events which took place after the election. Specifically, the Court asserted that the effects of the threat were dissipated because the plant was actually closed and the employees were given new jobs in the unit. The Sixth Circuit has thus taken an extreme position on the issue of

timeframe, a position it shares with at least one panel of the Fifth Circuit. See NLRB v. American Cable Systems, Inc., 427 F.2d 446 (5 Cir.), cert. denied 400 U.S. 957 (1970).[4] The Third Circuit also concurs in this view. See Hedstrom Co. v. NLRB, 558 F.2d 1137 (3 Cir. 1977). These courts would require the Board to, in effect, conduct an ongoing inquiry into the current residual impact of the unlawful activities which form the basis of the bargaining order. By contrast, the Seventh, Eighth, and Ninth Circuits view the date of the Board's order as the relevant cut-off period. NLRB v. Henry Colder Co., 447 F.2d 629 (7 Cir. 1971); Curlee Clothing Co. v. NLRB, 607 F.2d

---

4. Compare Bandag, Inc. v. NLRB, 583 F.2d 765 (5 Cir. 1978).

1213 (8 Cir. 1979); NLRB v. Coca-Cola Bottling Co. of San Mateo, 472 F.2d 140 (9 Cir. 1972).

The Board has resisted all of these views, and takes the position that its choice of remedy rests upon an evaluation of the seriousness of the unfair labor practices as of the time they were committed.[5] International Manufacturing Co., 238 NLRB No. 190 (1978), citing Gibson Products Co. of Washington Parish, La., 185 NLRB 362 (1970). In Gibson Products, the Board specifically considered and rejected the Fifth Circuit's view expressed in NLRB v. American Cable Systems, Inc., supra. The

5. The Board has carved out an exception for cases in which it is hearing a case for a second time upon remand by a reviewing court. In such cases, it will evaluate the impact of the unlawful activity as of the time of its prior decision.

Board first noted that, in Gissel, the Court ruled that a union's loss of majority status by the time of the Board's decision does not affect the validity of the Bord's bargaining order. The Board went on to announce its rule:

> ". . . Gissel, in our view, made it plain that the Supreme Court fashioned no different rule for authorization card cases from that which it applies in other cases where the union has lost majority status as a result of the employer's unfair labor practices and the time required for the Board to 'catch-up' with that unlawful action. In the former, no less than the latter, the Court held that the Board could properly impose a bargaining order even though the union may not in fact represent a majority of the current employee complement. It follows, therefore, that in determining whether the employer's unfair labor practices are of such a nature as to preclude a fair election and thus necessitate a bargaining order based on a past card showing of majority status, the situation must be appraised as of the time of the commission of the unfair labor practices, and not currently. For, in virtually every case, by the time a Board decision is reached, there is likely to be sufficient employee

> turnover and other changes to make it arguable, where the employer has meanwhile refrained from committing new unfair labor practices, that an election held now would be free of the taint of the old unfair labor practices. But, the union and the employees then supporting it were entitled to an election at an earlier time, and, if the employer's original unfair labor practices were of such a nature as to deprive them of an election at that time, to permit one now, when the union's support had been unlawfully dissipated 'would in effect be rewarding the employer and allowing him to profit from [his] own wrongful refusal to bargain.' Gissel, supra, 395 U.S. at 610."

The position of the Board is supported by this Court's recognition in Gissel that changes in circumstances could only be considered after the bargaining relationship had been given a chance to succeed. This Court stated:

> "For, as we pointed out long ago, in finding that a bargaining order involved no 'injustice to employees who may wish to substitute for the particular union some other * * * arrangement,' a bargaining relationship 'once rightfully established must be permitted to exist and

> function for a reasonable period in which it can be given a fair chance to succeed,' after which the 'Board may, * * * upon a proper showing, take steps in recognition of changed situations which might make appropriate changed bargaining relationships.' Franks Bros., supra, at 705-706, 64 S.Ct. at 819."
> 395 U.S. at 613

The lower court in this case, like the other courts of appeal in the cited cases, has refused to defer to this rule and consequently denied enforcement of the Board's order largely on that basis. This disagreement is of far more than technical importance, and requires resolution by this Court for several reasons.

In the first place, the Board's rule most effectively serves the purposes announced by this Court in Gissel, while the Sixth Circuit's contrary position creates the greatest possibility of both frustrating workers' rights of self-

determination and rewarding employer misconduct. The Board has the discretion to enter a bargaining order both to give effect to the employees' previously expressed (through authorization cards) choice of representative and to punish and deter employer misconduct. The passage of time, which the Sixth Circuit found dispositive in this case, cannot alter the fact that employees' pro-union sentiments were frustrated by illegal activity. A bargaining order based upon a card majority does not impose a new condition but simply restores the status quo which existed prior to the illegal activity. Substitution of a rerun election for a bargaining order because of the passage of time diminishes the possibility that such status quo will be restored, since a union's chances of reversing the results of a tainted

election in a rerun diminish with time. Gissel, at 611 nn. 30, 31. Moreover, the circumstance that an employer's unlawful activities cease after the union loses an election has no predictive value regarding "the likelihood of their recurrence" (Id. at 614) after a new election is scheduled. Once the union loses the election, the "need" for unlawful activity greatly diminishes. The rulings of the various courts of appeals reward an employer only for avoiding beating the dead horse of the union while consuming time in the litigation process.

The Board's rule, on the other hand, focuses on the immediate effects of the unfair labor practices as they happen. By thus foreshortening the timeframe, the Board vindicates the national labor policy favoring the prompt resolution of questions of employee

representation. See Leedom v. Kyne, 358 U.S. 184, 191-93 (1958) (Brennan and Frankfurter, J.J., dissenting); cf. American Federation of Labor v. NLRB, 308 U.S. 401 (1940). Workers are entitled to reasonably prompt resolution of questions of representation. A rerun election is a part of that process and is meaningful only if it can take place in a relatively short period of time. After all, a union may, on a 30% showing of interest, obtain a new election within 12 months of a prior defeat even if it never objected to the first election. Act §9(c)(3).

In Gissel, the Court expressed the balancing test which the Board must use as follows:

> "If the Board finds that the possibility of erasing the effects of past practices and ensuring a fair election (or a fair rerun) by the use of traditional remedies, though present, is slight and that employee sentiment once expressed through cards would, on balance, be better protected by a bargaining order, then such an order should issue . . . ." 395 U.S. at 614-15.

The Board, consistent with the national labor policy, has treated the proposed rerun election as a prompt one by focusing on the impact of the unfair labor practices in the time period which immediately follows them. If those illegal acts rendered a fair and prompt rerun impossible, a rerun several years later can hardly be said to be any remedy at all.

The dispute between the Board and the courts has implications broader than the labor relations issues which occasion the dispute. The courts of appeal, including the Sixth Circuit in the present case, have attacked and refused to enforce bargaining orders because they disagree with the Board's method of decisionmaking. The Board has

determined that it can faithfully carry out its responsibilities under Gissel and the Act by using a narrow timeframe to consider the impact of an employer's unfair labor practices. The courts disagree. and have substituted their judgment for the Board's. This Court has recently, in a related context, vigorously defended the power of administrative agencies to fulfill their statutory obligations free from judicial interference:

> "Absent constitutional constraints 'the administrative agencies "should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties."'" Vermont Yankee Nuclear Power v. Natural Resources Def. Council, 435 U.S. 519, 544 (1978).

A second reason, then, for this Court to assert itself in clarifying the issue raised by this petition is the need to

protect agencies such as the Board from inexpert interference from a judiciary bent on imposing its own view on the entity recognized by Congress and the Court as the proper forum for resolving these issues.

The Sixth Circuit's decision in this case presents a particularly appropriate opportunity for this Court to resolve what we have referred to as the "timeframe" issue. The decision below is an extreme example of a court using the passage of time to reverse a bargaining order granted by the Board. The Sixth Circuit has not merely concluded that the Board erred by failing to look a few months past the election to, say, the time of the ALJ's or Board's decision to weigh the possible impact of the unfair labor practices and consider the possibility of a fair election within that

time period. Instead, the Court ruled that the impact issue had to be considered in view of the more than four years of litigation since the election. The court gave no consideration to the employees' long-delayed right to representation or the benefit the court's view bestowed on the Company as a reward for years of litigation.

The lower court's decision is also particularly deserving of this Court's attention for its two startling new concepts which will further encourge employers to undermine illegally their workers' chosen representatives. The court pointed out, as a mitigating factor in analyzing the Company's illegal activities, that none was a "continuing violation." This new standard, peculiar to the Sixth Circuit,[6] effectively

6. See also NLRB v. East Side Shopper, Inc., 498 F.2d 1334 (6 Cir. 1974).

nullifies the bargaining order as a remedy for §8(a)(1) violations such as coercive speeches, threats, or interrogations. Such incidents are, by definition, not "continuing"; they may begin and end in a matter of minutes. Yet it is beyond dispute that such unlawful acts may form the basis for a bargaining order. In Gissel itself, a series of §8(a)(1) violations supported the bargaining order in The Sinclair Company case. The Sixth Circuit's "continuing violation" test simply makes no sense in the context of evaluating the severity of coercive activity.

A second significant departure from accepted bargaining order jurisprudence lies in the Court's finding that the Company's threat to close and move its plants was somehow dissipated by the actual closing of the Berea plant a few

months after the election. The legality of the actual closing did not, of course, make the Company's pre-election threat lawful nunc pro tunc. Nor could it detract from the well-accepted principle that a threat of plant closure is perhaps the most devastating form of pre-election coercion an employer may use to bully workers out of support for a union. Gissel at 611, n.31; Amalgamated Cloth. Workers of America v. NLRB, 174 U.S. App. D.C. 20, 527 F.2d 803 (1975), cert. denied sub nom. Jimmy-Richard Co. v. NLRB, 426 U.S. 907 (1976); Axton Candy & Tobacco Co., 241 NLRB No. 163 (1979). The Sixth Circuit in the present case in fact acknowledged that the threat of a plant closure "is one of the most coercive actions which a company can take in seeking to influence an election." (A7). The fact that an actual plant closing

followed the Company's threat was at least as likely to reinforce, rather than dissipate, the effect of the threat.

It is ironic that the Sixth Circuit cited as the mitigating factor the Company's beneficient act of finding the employees at the closed plant other jobs at no economic loss. This reasoning by the court demonstrates a complete misunderstanding of the field of labor relations and the effect of employer actions. The Board and this Court have frequently discussed the common employer anti-union tactic of the carrot and the stick. The employer both threatens and promises, takes away rights and grants benefits at the same time. One does not dissipate the other: rather, each act heightens the effect of the others. The employer shows his power over the livelihood of his employees and demonstrates

that if they avoid the union, they will be rewarded. The remainder of the message is that if they embrace the union they will be punished -- perhaps by plant closive and the permanent loss of jobs.

In the present case the Company threatened prior to the election to close one plant and asserted its right to close them all. No mention was made at that time that the employees would be found other jobs. After the election -- which the union lost -- the employer showed his power by closing one plant, but rewarded the employees and solidified his own support by granting them other jobs with no loss of benefits. For the Sixth Circuit to hold that these actions dissipate the effects of his illegal threats is to ignore both the logic of labor relations and an entire body of case law.

Even if the closing were somehow construed to have alleviated the effects of the threat, the Sixth Circuit would still stand alone in permitting an employer to evade its bargaining duty by manipulating its workers with a carrot and stick approach. Compare E. S. Merriman & Sons, 219 NLRB 972 (1975), mod. sub nom. NLRB v. E. S. Merriman & Sons, No. 75-3731, 99 LRRM 2634 (9 Cir. 1978); NLRB v. Copps Corp., 458 F.2d 1227 (7 Cir. 1972).

In the present case, the Sixth Circuit has not only endorsed an adjudicative rule that rewards an employer for inducing lengthy litigation, but has gone further by permitting an employer's self-serving interruption of his unlawful conduct to justify relief from the Board-ordered remedy. The Court could not ask for a more ripe opportunity to restore

the bargaining order as an effective, predictable remedy for employer misconduct.

II

THE COURT IGNORED THE SUBSTANTIAL EVIDENCE THAT THE COMPANY UNLAWFULLY THREATENED TO ENGAGE IN BAD FAITH BARGAINING WHICH WOULD FORCE THE EMPLOYEES TO STRIKE

The Court of Appeals had the duty to review the Board's findings on the basis of the now familiar "substantial evidence" test described in Universal Camera Corp. v. NLRB, supra. But the "substantial evidence" test does no more than permit the Court of Appeals to review the record as a whole. This Court has specifically barred the Courts of Appeal from electing to "displace the Board's choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it

de novo." Id. at 488. See also NLRB v. Walton Manufacturing Co., 369 U.S. 404, 405 (1962). Thus, where substantial evidence supports either of two conflicting inferences, a Court of Appeals cannot substitute its choice for the Board's. See, e.g., Local Union No. 2338, Int. Bro. of Electrical Workers v. NLRB, 162 U.S. App. D.C. 406, 499 F.2d 542 (1974).

In the present case, the court stood this rule on its head by its refusal to enforce the Board's ruling that the Company had unlawfully threatened to engage in sham bargaining. The Court not only dismissed the Board's lengthy recitation of passages from the September 8 speech (see pp. 13-15, supra), but went so far as to rest its exoneration of the Company on less than six lines of what the Board characterized as

"a long, rambling discussion . . . . "
None of the passages relied upon by the Court detracts in any way from the Board's conclusion. Indeed, the decision of the Court of Appeals rests on less evidence than does the ruling of the Board rejected by the Court.

The Sixth Circuit based its decision regarding the Company's speech on the fact that in the course of the speech the Company stated that he would "bargain in good faith." In so doing, the Court closed its eyes to the fact that in the same speech the Company had defined bargaining "in good faith" in an illegal and threatening way:

> "That is negotiating in good faith, because all you've got to do, I am sure, is keep talking and keep talking and keep saying no until finally you all decide to go on and step outside and stand outside the same stake that this union is trying to get in, but now my employees step out and join them and they stand out there, outside of that stake. [Emphasis supplied.]
>
> "Don't forget. You can't step on our front lawn, and we'll put up a few more stakes to be sure that our own employees don't come back in again...."(A15-A16).

Thus, each time the Company promised to bargain in the way it considered to be "in good faith," this threat was repeated. The Sixth Circuit, rather than the Board, ignored the context of the Company's statements.

In ruling that the speech violated the Act, the Board overruled the Administrative Law Judge. The Court of Appeals preferred the Administrative Law Judge's interpretation of the speech. In treating the issue of the speech, the Court used the ALJ's decision as a starting point, noting that he quoted from the speech and considered testimony regarding employees' perceptions of it. The Court never states

that the Board's ruling is unsupported by substantial evidence, but merely chooses to "agree with the Administrative Law Judge . . . ."

In Universal Camera, this Court ruled that an Administrative Law Judge's report on a case constitutes a part of the record. Howeover, "[t]he significance of his report depends, of course, largely on the importance of credibility in the particular case." 340 U.S. at 496. The Court of Appeals in the present case ignored the Ninth Circuit's admonition that, "We must still start with the finding made by the Board and accept it if it is supported by substantial evidence." NLRB v. Pacific Grinding Wheel Co., Inc., 572 F.2d 1343, 1347 (9 Cir. 1978). The Court merely preferred the ALJ's ruling even though credibility was not at issue as far as the speech was concerned. The ALJ simply chose to

give a contrary interpretation to a speech, the contents of which were not at issue. The First Circuit, like the Ninth, has clearly ruled that courts should give little weight to an ALJ's opinion rejected by the Board where the disagreement "is confined to drawing different inferences or legal conclusions as opposed to questions of fact or credibility." NLRB v. Matouk Industries, Inc., 582 F.2d 125, 128 (1 Cir. 1978), citing cases from the District of Columbia, Seventh and Ninth Circuits.

> "[I]f the Board can point to evidence which supports its inference, courts have allowed the Board's finding to stand despite the fact that the Administrative Law Judge interpreted the facts contrary to the inference drawn." NLRB v. Pacific Grinding Wheel Co., Inc., supra, at 1347.

See also, e.g., NLRB v. Central Machine & Tool Co., 424 F.2d 542 (10 Cir. 1970), cert. denied 407 U.S. 910 (1972); Russell-

Newman Mfg. Co. v. NLRB, 407 F.2d 247 (5 Cir. 1969).

The Court of Appeals in the present case has thus committed two glaring errors in reviewing the Board's finding regarding the speech. Most basically, it substituted its own chosen interpretation of the speech for the Board's even though the Court could not point to anything in the record which would negative the Board's inferences. In addition, the Court usurped the Board's role as reviewer of an Administrative Law Judge's findings by analyzing the case as though the order of the ALJ, rather than that of the Board were before it. In so proceeding, the Sixth Circuit deviated from the methodology of numerous other courts of appeal. By these two fundamental errors, the Court misapprehended the substantial evidence rule in a

way which requires correction by this Court.

III

THE COURT OF APPEALS IMPROPERLY THRUST ITSELF INTO THE ADMINISTRATIVE PROCESS BY DECLINING TO REMAND THE CASE TO THE BOARD

The Court of Appeals sustained all of the Board's findings regarding the Company's violations of §8(a)(1) except for the threat of sham bargaining. These unfair labor practices included:

- The granting of the benefit of arbitration of disputes;
- The granting of the benefit of assistance in obtaining bank loans;
- The threat to close the company's operations;
- Interrogating and threatening employee Steyer.

Although the Court did not disturb these findings, it reversed the Board's ruling that in the September 8 speech the

Company's president unlawfully threatened to engage in sham bargaining.

At that point, proper deference to the Boards expertise in the field of labor relations required that the Court remand the case to the Board for reconsideration of the bargaining order remedy. In Gissel, this Court specifically held that consideration of the need for a bargaining order should be left, in the first instance, to the Board. The Board entered the bargaining against the Company on the basis of the seriousness of all of the unfair labor practices.[7] The Board has never had an

7. The statement by the Court of Appeals that "it is clear that the [Board's] decision [to order the Company to bargain] was determined to a large extent by the finding that there had been a threat of sham bargaining" (A9) has no support in the record. The Board's decision shows that no one of the several 8(a)(1) violations was isolated as decisive. (A19-20).

opportunity to decide whether remediation of the remaining unfair labor practices, including the threat to close the plant, required a bargaining order notwithstanding the legality of the September 8 speech. The Court of Appeals has deprived the Board of this opportunity by refusing to remand the case and claiming for itself the power to determine the remedy in the first instance.

The Courts of Appeals for the Second and Third Circuits have followed a contrary procedure. In Hedstrom Co. v. NLRB, 558 F.2d 1137 (3 Cir. 1977), the Court reversed the Board's ruling concerning some, but not all, of the unfair labor practices committed by the Company. Unlike the court below in the present case, however, the Third Circuit did not, on its own, reevaluate the bargaining order in this changed legal setting.

Rather, it remanded the case to the Board for reconsideration of the remedy. Similarly, in NLRB v. General Stencils, Inc., 438 F.2d 894 (2 Cir. 1971), the Court remanded the case to the Board after reversing the Board's findings on some of the unfair labor practices underlying the Board's decision.

The present case presents this Court with the opportunity to delineate the allocation of responsibility between administrative agencies and reviewing courts. This Court has already directed the Courts of Appeals not to step in and impose their judgment on an issue statutorily assigned to an agency in the absence of agency action. See, e.g., F.T.C. v. Sperry and Hutchinson Co., 405 U.S. 233, 248-50 (1972); Securities and Exchange Com. v. Chenery Corp., 318 U.S. 80, 88 (1943). To date, however, this Court has not addressed the question of administrative law raised when a reviewing court reverses one of several factual bases upon which an agency bases its order.

Such reversal effectively creates a new legal and factual setting not previously considered by the agency. When reviewing courts decide the new remedy-related issues on their own, without guidance from the agency involved, they "intrude upon the domain which Congress has exclusively entrusted to an administrative agency." Id. The importance of this question to all areas of administrative law cannot be overstated.

CONCLUSION

The decision of the court below radically rewrites the standards for

issuance of a bargaining order in a manner which will encourage employers to commit unlawful acts which will destroy a union's majority. The reasoning of the Court of Appeals leads inexorably to the conclusion that employers may violate the Act as dramatically as they wish prior to a representation election if only they cease their coercive activity after their goal, the union's defeat in the election, is achieved. The Sixth Circuit, like several other courts of appeal, has squarely rejected the Board's analysis of the factors relating to the issuance of bargaining orders, resulting in serious difficulties in the administration of this Court's Gissel decision. Eleven years having passed since the decision in Gissel, the time is ripe to reassert the importance of protecting employees' rights to representation by

the chosen agent of their majority in the face of unlawful behavior. The court below sanctioned a violation of those rights by an astonishing misreading of its role as an appellate court, in both its misuse of the substantial evidence test and its failure to give the Board an opportunity to apply its expertise on the new state of facts found by the Court.

Respectfully submitted,

James F. Gill
230 Park Avenue
New York, New York 10017

Of counsel:

Robinson, Silverman, Pearce
Aronsohn & Berman
Michael F. O'Toole
Andrew Irving

Appendix

No. 77-1269

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DONN PRODUCTS, INC. and AMERICAN METALS CORP. *Petitioners,* v. NATIONAL LABOR RELATIONS BOARD, *Respondent.*	ON PETITION for review and Cross-Application for Enforcement of an Order of The National Labor Relations Board.

Decided and Filed January 17, 1980.

Before: WEICK, LIVELY and KEITH, Circuit Judges.

LIVELY, Circuit Judge. Donn Products, Inc. and a subsidiary (collectively, the company) have petitioned for review of a decision and order of the National Labor Relations Board (the Board). In its decision and order, which is reported at 229 NLRB No. 9, the Board found that the company had violated sections 8(a)(1) and 8(a)(5) of the Labor Management Relations Act of 1947, as amended, (the Act), 29 U.S.C. § 151 *et seq.* The Board ordered the company to desist from enumerated unfair labor practices. It further ordered that an election which Local 450 of the United Furniture Workers of America, AFL-CIO (the union) had lost be set aside and that the company be required to bargain with the union, upon request, without the necessity for a rerun election.

The organizational campaign began in March 1975, the union claimed a majority on the basis of authorization cards as of July 9th and the election was held on September 10,

1975. The union filed exceptions to the conduct of the election and the Board issued an unfair labor practices complaint. A consolidated hearing was held before an administrative law judge in July and August 1976. In his decision filed October 18, 1976, the administrative law judge found that from the beginning of the campaign heavy barrages of propaganda were aimed at the employees of the company from both sides. The employees were importuned relentlessly with both written and spoken arguments in favor of, and in opposition to, unionization. Based upon a voluminous record the administrative law judge found that the company had violated section 8(a)(1) of the Act, 29 U.S.C. § 158(a)(1),[1] by several of its activities which took place in the period immediately prior to the election. Acts found to be illegal promises of benefits were the unilateral grant of binding arbitration as the final stage of an established grievance procedure, the announcement of a "preferred loan" plan, the announcement of a new plant-wide bonus system, and the promise to look into a dental insurance program. Acts found to be coercive were a discussion by the company's president of the possibility of moving production from one of the plants in the bargaining unit to another plant and closing the former, interrogation of two employees about union activities by a management employee, and a threat to discharge one of these employees and to prosecute the other for distributing union literature on company premises.

Contrary to the claim of the union, the administrative law judge found that the company never told the employees that if it were required to bargain with the union, it would refuse to do so in good faith. The administrative law judge referred to this claim as a "blunderbus [sic] assertion" based on the "totality of [the company's] conduct." Considering

[1] Section 8(a)(1) makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of" their right to organize for purposes of collective bargaining.

the union's claim that a fair election would be impossible because of the unfair labor practices of the company, the administrative law judge found that there were no "flagrant" or "egregious" violations of the Act and that the violations which did occur fell within the "minor category" described by the Supreme Court in *N.L.R.B.* v. *Gissell Packing Co.*, 395 U.S. 575, 615 (1969). Concluding that the violations did not preclude the holding of a fair election at the time of his decision, the administrative law judge recommended entry of a cease and desist order, but held that an affirmative order to bargain was not warranted.

The decision of the Board affirmed the findings and decision of the administrative law judge except with respect to the issues of sham bargaining and remedy. The Board found that the administrative law judge failed to consider the transcript of a September 8, 1975 speech of the company's president, which had been admitted into evidence. After quoting selectively from ten short paragraphs of the speech, which covers 50 pages in the appendix, the Board concluded, "Thus, Respondent [the company] repeatedly stated that it intended to engage only in sham bargaining and force the employees into a position where they had to strike." Finding this "threat of sham bargaining" a section 8(a)(1) violation, the Board stated that it disagreed with the finding of the administrative law judge that the unfair labor practices "were not serious enough to prevent the holding of another election."

In its petition for review the company contends that the union never established that it had a majority within the bargaining unit. There were 288 eligible employees and the administrative law judge found that 156 had signed authorization cards. Though the company contends the evidence relied upon to authenticate a number of the cards was not sufficient, the record does not support its position. There could be no disagreement as to what the clear language of the cards authorized. Those who signed them indicated their

choice of the union as their collective bargaining representative. There was no evidence which required a finding that employees were told the cards were just to secure an election or that any inducements were offered which violated the rule set forth in *N.L.R.B.* v. *Savair Manufacturing Co.*, 414 U.S. 270 (1973). The finding that the union represented a majority of the employees on or about July 9, 1975 is affirmed.

The company also contends that the Board erred in finding it guilty of any unfair labor practices. Though the evidence on which some of the findings were based is marginal, we conclude that each of the section 8(a)(1) violations found by the administrative law judge and affirmed by the Board is supported by substantial evidence. We conclude, however, that the finding of the Board, in disagreement with the administrative law judge, that the company threatened to engage in sham bargaining is not supported by substantial evidence when the entire record is considered.

It is the position of the General Counsel of the Board and of the union, which apeared as intervenor, that the record demonstrates conclusively that the administrative law judge did not consider the transcript of the company president's speech to the employees and their spouses on September 8, 1975. This deduction is based on the fact that the administrative law judge described the evidence of sham bargaining as "nebulous, vague, [and] indirect," and that he referred to witness testimony about the speech in his opinion. This argument overlooks several significant portions of the opinion of the administrative law judge. In calling the evidence "nebulous, vague, indirect" the administrative law judge was clearly referring to union claims based on "the totality" of the record, not on the September 8th speech alone. Among the items included in this "totality," the administrative law judge specifically identified "the extended speeches to assembled employees and the unending writings handed to each of them." On the other hand, in dealing with the September 8th speech,

he showed a familiarity with its content and used at least one verbatim quotation from it. It is clear that the administrative law judge considered the transcript of the speech. However, he also dealt with the employees' perception of the speech and referred to testimony from these sources. This was a relevant consideration since it was claimed that the speech was intended to interfere with the right of employees to organize by telling them in advance that there would be no good faith bargaining by the company. *N.L.R.B.* v. *Gissell Packing Co., supra*, 395 U.S. at 619. It is interesting that several witnesses remembered that the speaker affirmed the company's duty to negotiate in good faith.

In its decision the Board quoted portions of the speech from which an intention not to bargain in good faith might be inferred, if those statements had stood alone. However, the decision did not quote or even mention statements which indicated that good faith bargaining would take place if the union won the upcoming election. In describing "what really happens at a bargaining table," the speaker said that the union would start high and the company would start low. He described the process of give and take by both parties and then said, "So we have to hit somewhere in the middle, so this is what you call negotiating time." After pointing out that "a lot of it is for show," the president stated, ". . . there's tactics involved at a bargaining table. 'I will give you this and you take this,' and back and forth back and forth." The Board decision emphasized the statements which indicate that the company intended to engage in hard bargaining and that an impasse might be reached, resulting in a strike. However, when the speech is considered in its entirety, we agree with the administrative law judge that it cannot be considered an advance threat not to bargain in good faith if the union should be certified.

The Supreme Court made it clear in *N.L.R.B.* v. *Gissell Packing Co., supra*, 395 U.S. at 602, that an election remains

the preferred method of determining the choice by employees of a collective bargaining representative. However, the Court recognized two categories of cases where an employer may be ordered to bargain with a union which has not won a representation election. *Gissell,* 395 U.S. at 613-15. *See Automated Business Systems* v. *N.L.R.B.*, 497 F.2d 262, 267 (6th Cir. 1974). In the present case the administrative law judge found that the unfair labor practices committed by the company were neither "flagrant" nor "egregious," and were in fact "minor." Thus he concluded that the violations should be placed in the third *Gissell* category, which will not sustain a bargaining order. *Gissell, supra,* 395 U.S. at 615.

The Board treated the unfair labor practices in the present case as properly falling in the second *Gissell* category. In this category, if the union demonstrates that it had a majority "at one point," the Board may issue a bargaining order in cases where the unfair labor practices are not "outrageous" or "pervasive," but which "nonetheless still have the tendency to undermine majority strength and impede the election processes." *Id.* at 614. In disagreeing with the conclusion of the administrative law judge on the seriousness of the company's violations, the Board stated, "In our view there is little or no likelihood that a second and fair election could be conducted in the face of the Respondent's far-reaching unfair labor practices. . . ." This conclusory statement was followed by this explanation:

> Here, Respondent's unlawful conduct began early in the union campaign, continued through the election, and resulted in the dissipation of the Union's majority status. Thus, Respondent interrogated and threatened to discharge Steyer, a member of the union organizing committee, and threatened to prosecute employee Wasik for distributing union literature in the plant. It granted benefits to employees by instituting an arbitration procedure during the campaign and by materially assisting employees to obtain personal bank loans. Finally, Respondent made repeated threats that it would engage in sham bargaining should the Union be selected, and threatened economic retaliation by closing the plant in the event the Union won the election.

We have determined that the finding with respect to sham bargaining was not supported by substantial evidence. Only two out of 288 employees who worked in three separate plants were interrogated or threatened with discipline or discharge. No one was discharged and there were no general threats to punish employees for union activities. Further, there were no section 8(a)(3) violations.[2] The effect of the unilateral institution of arbitration, the arrangement for assisting employees to obtain bank loans, and the promise of a plant-wide bonus system can be eliminated from a future election by a cease and desist order. What the Board characterized as a threat of economic retaliation by closing a plant if the union won the election would not be a factor in a future election. Even though the union lost the election of September 10, 1975, the company did close the plant and it offered all employees there transfers to other nearby plants. All the affected employees accepted the offer. The Board found that the decision to close the plant was based on economic factors and declined to order the company to reopen it.

There is nothing in the record to indicate that any of the violations are of a continuing nature. We recognize that a threat of economic retaliation by closing a plant is one of the most coercive actions which a company can take in seeking to influence an election. *Automated Business Systems* v. *N.L.R.B., supra,* 497 F.2d at 276 (Edwards, J., dissenting in part). Nevertheless, the plant has now been closed without harm to any employee, and it is difficult to understand how

---

[2] Section 8(a)(3) makes it an unfair labor practice for an employer to encourage or discourage membership in a labor union by discrimination in hire, tenure or any term or condition of employment.

this could interfere with a fair rerun election. The Board made no findings or detailed analysis as to the residual impact or continuing effect, or the likelihood of recurrence, of any of the unfair labor practices. *Cf. First Lakewood Associates* v. *N.L.R.B.*, 582 F.2d 416, 423 (7th Cir. 1978); *Hedstrom Co.* v. *N.L.R.B.*, 558 F.2d 1137, 1152 (3d Cir. 1977). While we are required to respect the special expertise of the Board, particularly in the formulation of remedies, courts are not required to enforce bargaining orders based on conclusory statements unsupported by sufficient facts. *See N.L.R.B.* v. *East Side Shopper, Inc.*, 498 F.2d 1334 (6th Cir. 1974); *Automated Business Systems* v. *N.L.R.B., supra; N.L.R.B.* v. *Essex Wire Corp.*, 496 F.2d 862 (6th Cir. 1973); *N.L.R.B.* v. *Jamaica Towing, Inc.*, 602 F.2d 1100 (2d Cir. 1979); *N.L.R.B.* v. *General Stencils, Inc.*, 438 F.2d 894 (2d Cir. 1971) and 472 F.2d 170 (2d Cir. 1972) (following remand to Board); *Hedstrom Co.* v. *N.L.R.B., supra; First Lakewood Associates* v. *N.L.R.B., supra; N.L.R.B.* v. *American Cable Systems, Inc.*, 427 F.2d 446 (5th Cir.), *cert. denied*, 400 U.S. 957 (1970).

Our study of the entire record convinces the court that this was not a proper case for a bargaining order. There was a hard-fought campaign, but the classic tactics of discharge and widespread discrimination against and harassment of union sympathizers were not present. Though we have sustained the finding that there was a threat of plant closing, the Board has determined that the actual closing which followed the union's loss of the election was for economic reasons. The unfair labor practices which occurred were of a kind whose effect would quickly dissipate.

If the record merely caused doubt as to the Board's reasons for ordering bargaining we would remand for further explication of its reasons. *See Automated Business Systems* v. *N.L.R.B., supra; N.L.R.B.* v. *General Stencils, Inc., supra*, 438 F.2d 894; *Hedstrom Co.* v. *N.L.R.B., supra*. However, though the Board gave little explanation for its decision in the

present case, it is clear that the decision was determined to a large extent by the finding that there had been a threat of sham bargaining. With this violation eliminated we agree with the administrative law judge that a bargaining order was not justified. It has now been more than four years since the election was held. We believe the purposes of the Act will be best served by an early rerun election.

The findings of section 8(a)(1) violations by the Board, with the exception of the finding of a threat of sham bargaining, are affirmed. The finding by the Board of a section 8(a)(5) violation is reversed. The order of the Board is enforced with the exception of paragraphs 1(a), 1(d), 2(a) and 2(b). Enforcement of these excepted provisions of the order is denied. The notice to employees which the Board ordered posted will be modified to reflect the partial denial of enforcement. This will require deletion of all references to bargaining with the union and removal of literary paragraphs 1, 4, 12, 14 and 15 from the notice.

No costs allowed.

229 NLRB No. 9

D-2352
Westlake, Ohio

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

DONN PRODUCTS, INC. &
AMERICAN METALS CORPORATION

and

UNITED FURNITURE WORKERS LOCAL 450, UNITED FURNITURE WORKERS OF AMERICA, AFL-CIO

Cases
8--CA-9464
and
8--RC--9998

DECISION AND ORDER

On October 18, 1976, Administrative Law Judge Thomas A. Ricci issued the attached Decision in this proceeding. Thereafter, the General Counsel, the Respondent,[1] and the Charging Party

[1] Donn Products, Inc., and its wholly owned subsidiary, American Metals Corporation, are referred to herein collectively as Respondent.

filed exceptions and a supporting brief, and the Respondent filed a reply to the General Counsel's and the Charging Party's exceptions. The Charging Party filed a brief in opposition to the Respondent's exceptions.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings,[2] findings,[3] and conclusions[4] of the Administrative Law Judge to the extent consistent herewith.

[2] The Administrative Law Judge credited the testimony of employee Gerald Waskik with respect to Company President Brown's remark regarding plant relocation. Although he admitted a transcript of these remarks into evidence, he made no reference to it. It is however, not necessary

footnote continued
to make any modification in the Administrative Law Judge's finding since Wasik's recounting of Brown's remarks is substantially the same as the transcribed account.

[3]The Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an Administrative Law Judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. Standard Dry Wall Products, Inc, 91 NLRB 544 (1950), enfd. 188 F. 2d 362 (C.A. 3, 1951). We have carefully examined the record and find no basis for reversing his findings.

[4]We agree with the Administrative Law Judge's conclusion that Brown's remarks regarding plant relocation were in violation of Sec. 8(a)(1) of the Act. They occurred against a background of threats, interrogations, and promises and grants of benefits. In this context, Brown's talk about Respondent's ability to move the plant wherever it wanted constituted a threat of economic reprisal in the event the Union won the election.

1. The Administrative Law Judge found that Respondent's president, Donald Brown, did not announce in advance that if the Union were certified Respondent would not bargain in good faith.

The General Counsel and the Charging Party have excepted, contending that the Administrative Law Judge incorrectly failed to consider the entire record on this issue, particularly the transcripts of the Union's tape recording of speeches made by Brown at employee meetings on September 5 and 8, 1975.[5] They argue that, although he properly admitted these transcripts into evidence, he ignored them and incorrectly subsequently referred to the evidence on the issue of bad faith bargaining as "nebulous, vague, indirect." We find merit in these exceptions.

Brown's speech on September 8 is a long rambling discussion. On several occasions he made statements that

---

[5]All named months and dates refer to 1975, unless otherwise indicated.

indicate he was willing to engage in a type of bargaining which amounts to no more than a show. Thus Brown stated:

> As I mentioned to you before, I am not inclined to be forced to do anything. It is a free country, I am a free man, and I believe that I ought to be able to do what I believe I have to do and, that is, I'll bargain; but it's like leading a horse to water. When he's got his head underwater, you don't know for sure he is drinking, but then you've got to practically drown the horse before he drinks enough water, before you bring him out.
>
> So this is how the battle starts....
>
> * * * * * *
>
> The length of negotiations has to do with how long do you hold the horse's head under the water. Finally he wants a drink of water and he comes up, so he talks for a little bit, a little while, and goes back and forth. And, as I pointed out, a lot of it is for show.

Brown then went on to make it clear that the employees' only hope of obtaining an agreement was to call a strike with the possible loss of jobs:

> . . .[I]f I decide I'm not going to do something and it doesn't matter what it is, there's no law in this country that says I have to.
>
> So then we start down the line: "How far are we going to carry this out?" Well, this is what happens---it's very simple---we reach the point of impasse. That's really easy to [r]each, a point of impasse.
>
> You say, "Well, you got to keep talking," and you've got to keep talking and negotiating with the union or you've got to be continuing to negotiate in what they call good faith. I am an expert. That is negotiating in good faith, because all you've got to do, I am sure, is keep talking and keep talking and keep saying no until finally you all decide to go on and step outside and stand outside the same stake that this union is trying to get in, but now my employees step out and join them and

they stand out there, outside of that stake. [Emphasis supplied.]

Don't forget. You can't step on our front lawn, and we'll put up a few more stakes to be sure that our own employees don't come back in again, because when you are on strike it's no longer your company, it's not your company any more. You have dicided that you are going to go somewhere else and you won't come back to work unless you get whatever your demand is.

Brown then told the employees in effect that he would resist any union proposal by asking it to take less. He again told the employees that if they selected the Union they would face a long strike and the loss of benefits they presently enjoyed:

Well, how do you cause the company to hurt? You try and get even with us for not negotiating as much as you think you would like to have and, therefore, you go out on strike, and you step out, pick up your signs, and there you are.

Now, it's very simple. When are you going to come in? We'll come in when our demands are met." [Emphasis supplied.]

"When are your demands met?" You know I am going to have to be the one to meet them. So, now time goes by and the talk behind the scenes naturally is, "I wonder when they are going to be tired of losing money by sitting out there and wanting to come in, and how much do they think they are going to get? How much extra do they think they are going to get?" And all these favoritisms and all these other little things that you are talking about, and some of them are pretty small, how long are you going to stay out there? Well, it's your guess; it's my guess.

Thus, Respondent repeatedly stated that it intended to engage only in sham bargaining and force the employees into a position where they had to strike. Respondent thereby conveyed to employees the futility of choosing union representation and presented them with only a choice between striking and no union.[6] In so doing, Respondent restrained and coerced employees in violation of Section 8(a)(1) of the Act.[7]

---

[6] Boaz Spinning Company, Inc., 177 NLRB 788(1969).

footnote continued

[7] Princeton Sportswear Corporation of Pennsylvania, 220 NLRB 1345, 3347 (1975); St. Anne's Home, Division of De Paul Community Health Center, 221 NLRB, 839, 844 (1975)

2. The Administrative Law Judge found, and we agree, that the Union represented a majority of Respondent's employees when its demand for recognition was refused on July 9. However, he found that while Respondent's unfair labor practices warranted the setting aside of the election they were not serious enough to prevent the holding of another election. We disagree. In our view there is little or no likelihood that a second and fair election could be conducted in the face of the Respondent's far-reaching unfair labor practices, and a bargaining order therefore is required to protect the employees' representational rights.

Here, Respondent's unlawful conduct began early in the union campaign, continued through the election, and resulted in the dissipation of the Union's majority status. Thus, Respondent interrogated and threatened to discharge Steyer, a member of the union organizing committee, and threatened to prosecute employee Wasik for distributing union literature in the plant. It granted benefits to employees

by instituting an arbitration procedure during the campaign and by materially assisting employees to obtain personal bank loans. Finally, Respondent made repeated threats that it would engage in sham bargaining should the Union be selected, and threatened economic retaliation by closing the plant in the event the Union won the election.

These unfair labor practices, directly affecting all of Respondent's employees, were intended to, and did in fact, undermine the Union's majority strength. In these circumstances, we find that "employee sentiment, once expressed through cards, would, on balance, be better protected by a bargaining order."[8]

Having determined that the Union represented the majority of the employees in the appropriate unit, we find that Respondent violated Section 8(a)(5) and (1) of the Act by refusing the Union's

[8] N.L.R.B. v. Gissel Packing Co., Inc., 395 U.S. 575 (1969).

demand for recognition. We further find that Respondent is required to presently bargain, upon request, concerning any terms and conditions of employment, as to which it would have been required to bargain had the Union been recognized on July 9, 1975, the date on which the Union demanded and was refused recognition. We need not require bargaining as to anything prior to July 9, 1975, since all of the violations committed prior to that date are otherwise remedied.[9]

3. Inasmuch as the Union has been the exclusive representative of the employees in the appropriate unit since July 9, we find that Respondent violated Section 8(a)(5) and (1) of the Act by incorporating the arbitration procedures into an employee manual distributed in August. We shall order Respondent to return to the status quo ante by rescinding the arbitration procedure. We also find that Respondent violated Section

[9] Trading Port, Inc., 219 NLRB 298 (1975). Chairman Fanning, in accordance with his concurring opinion in Trading Port, finds that the obligation to bargain arose on the date of demand, July 9, 1975.

8(a)(5) and (1) of the Act by materially assisting employees to obtain personal bank loans. We further find Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally transferring the work at its Berea, Ohio, plant to the plants in Westlake and Medina, Ohio, in December, without bargaining with the Union as to the decision to transfer and its effects on the employees represented by the Union. While we now order Respondent to bargain with the Union over the decision to transfer and its effects, we find it unnecessary to order that Respondent reestablish the Berea plant inasmuch as the decision to transfer was based on economic factors, all the 36 employees involved accepted transfers to Respondent's other plants, and it would place an undue burden on Respondent to reopen the Berea plant.[10] We also find it unnecessary to award a backpay remedy, since the employees at the Berea plant

[10] Cf. Burroughs Corporation, 214 NLRB 571 (1974).

have accepted transfers to Respondent's other locations without financial loss, and the Union has retained its bargaining strength by continuing to represent the employees at the Westlake plant.[11]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Donn Products, Inc. & American Metals Corporation, Westlake, Ohio, their officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Failing and refusing to bargain collectively in good faith with United Furniture Workers Local 450, United Furniture Workers of America, AFL-CIO, hereinafter the Union, as the exclusive representative of its employees in the appropriate unit set forth herein below concerning the decision to close the Donn Products, Inc.,

[11] Cf. Mobil Oil Corporation, 219 NLRB 511 (1975); Interstate Tool Co., Inc. 177 NLRB 686 (1969).

plant at Berea, Ohio, and the effects of the discontinuance of the plant on such employees. The appropriate unit is:

All production and maintenance employees, including shipping and receiving employees, plant janitor, the paint technician, the chief inspector, assistant foremen, leadmen and probationary or production trainee employees of the Respondent at its two facilities in the Cleveland area, namely, Donn Products, Inc. and American Metals Corporation, 1000 Crocker Road, Westlake, Ohio, excluding office clerical employees, technical employees, engineers and draftsmen, production clerk, foremen, and all professional employees, guards and supervisors as defined in the Act.

(b) Unilaterally, without prior notice to or consultation with the Union, instituting a binding arbitration procedure.

(c) Unilaterally, without prior notice to or consultation with the Union, establishing a system of materially

assisting employees to obtain personal bank loans.

(d) Refusing to bargain collectively with the Union as the exclusive bargaining representative of the employees in the appropriate unit.

(e) Granting its employees a binding arbitration procedure in order to dissuade them from prounion activities, establishing an unprecedented system of materially assisting employees to obtain personal bank loans, threatening to move its business to other locations, interrogating employees about their union activities and about the union activities of other employees, threatening to discharge employees and to prosecute them because of their union activities, telling employees they would be disciplined more harshly because of their union activities, promising employees an improved bonus system to induce them to abandon the Union, or threatening to bargain in bad faith.

(f) In any other manner interfering with, restraining, or coercing employees in the exercise of the right to self-organization, to form, join, or assist the Union, or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any and all such activities.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Upon request, recognize and bargain with the Union as the exclusive representative of all employees in the appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody it in a written signed agreement.

(b) Upon request, bargain in good faith with the Union with respect to the decision to transfer all the work from the Respondent's plant at Berea, Ohio,

to the Respondent's plant at Medina, Ohio, and the effects of the decision on unit employees, and, if an understanding is reached, embody it in a written signed agreement.

(c) Rescind the arbitration provisions which were formally incorporated into Respondent's employee manual distributed in August 1975.

(d) Post at its places of business in Westlake and Medina, Ohio, copies of the attached notice marked "Appendix."[12] Copies of said notice, on forms provided by the Regional Director for Region 8, after being duly signed by Respondent's representative, shall be posted by the Respondent immediately

---

[12]In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by it to insure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for Region 8, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

IT IS FURTHER ORDERED that the election in Case 8-RC-9998 be, and the same hereby is, set aside, and the petition filed in Case 8-RC-9998 be, and the same hereby is, dismissed.

Dated: Washington, D.C. April 20, 1977

John H. Fanning, Chairman

John A. Penello, Member

Betty Southard Murphy, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the

National Labor Relations Board

An Agency of the United States Government

WE WILL NOT fail or refuse to bargain collectively in good faith with United Furniture Workers Local 450, United Furniture Workers of America, AFL-CIO, as the exclusive representative of our employees in the appropriate unit set forth below concerning the effect of the decision to close the Donn Products, Inc., plant at Berea, Ohio, and the effects of the discontinuance of the plant on such employees. The appropriate unit is:

> All production and maintenance employees, including shipping and receiving employees, plant janitor, the paint technician, the chief inspector, assistant foremen, leadmen and probationary or production trainee employees of the Respondent at its two facilities in the

Cleveland area, namely, Donn Products, Inc. and American Metals Corporation, 1000 Crocker Road, Westlake, Ohio, excluding office clerical employees, technical employees, engineers and draftsmen, production clerk, foremen, and all professional employees, guards and supervisors as defined in the Act.

WE WILL NOT unilaterally, without prior notice to or consultation with the Union, institute a binding arbitration agreement.

WE WILL NOT unilaterally, without prior notice to or consultation with the Union, establish a system of materially assisting employees to obtain bank loans.

WE WILL NOT refuse to bargain collectively with United Furniture Workers Local 450, United Furniture Workers of America, AFL-CIO, as the exclusive bargaining representative of the employees in the unit described above.

WE WILL NOT grant our employees a binding arbitration agreement in order

to dissuade them from prounion activities.

WE WILL NOT establish an unprecedented system of materially assisting our employees to obtain personal bank loans to curb their union activities.

WE WILL NOT threaten to move our plant to other locations to discourage union activities.

WE WILL NOT interrogate our employees about their union activities or about the union activities of other employees.

WE WILL NOT threaten to discharge employees or to prosecute them because of their union activities.

WE WILL NOT tell our employees that they will be disciplined more harshly in the future because of their union activities.

WE WILL NOT promise an improved bonus system to induce our employees to abandon the Union.

WE WILL NOT threaten to bargain in bad faith.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of their

right to self-organization, to join or assist United Furniture Workers Local 450, United Furniture Workers of America, AFL-CIO, or any other labor organization, or to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection or to refrain from any and all such activities.

WE WILL, upon request, recognize and bargain with the United Furniture Workers Local 450, United Furniture Workers of America, AFL-CIO, as the exclusive representative of the employees in the appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody it in a written signed agreement.

WE WILL, upon request, bargain collectively in good faith with United Furniture Workers Local 450, United Furniture Workers of America, AFL-CIO, as the exclusive representative of our employees in the appropriate unit concerning the decision to close the Donn

Products, Inc., plant in Berea, Ohio, and the effects of the decision on unit employees, and, if an understanding is reached, embody it in a written signed agreement.

WE WILL rescind the arbitration provision which were formally incorporated into our employee manual distributed in August 1975.

DONN PRODUCTS, INC. &
AMERICAN METALS CORPORATION
(Employer)

Dated_____

By_____
(Representative)

_____
(Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be

directed to the Board's Office, Suite 1695, Anthony J. Celebrezze Federal Building, 1240 East Ninth Street, Cleveland, Ohio 44199, Telephone 216-522-3126.

JD-672-76
Westlake, OH

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

DONN PRODUCTS, INC. &
AMERICAN METALS CORPORATION

and

UNITED FURNITURE
WORKERS LOCAL 450,
UNITED FURNITURE WORKERS OF
AMERICA, AFL-CIO

Cases 8-CA-9464
8-RC-9998

Charles Z. Adamson, Esq.,
and John S. Chindlund, Esq.,
for the General Counsel.
Peter O'Connell, Esq., of
Robinson, Silverman, Pearce,
Aronsohn, Sand & Berman, of
New York City, NY, for the
Charging Party.
Thomas J. McDermott, Esq., and
Joseph F. Ruggie, Jr., Esq.,
of Thompson, Hine & Flory, of
Cleveland, OH, for the
Respondent.

DECISION

Statement of the Case

THOMAS A. RICCI, A.L.J.: A hearing in this consolidated proceeding was held at Cleveland, Ohio, on July 12 and 13, and on August 16 and 17, 1976. The complaint in Case 8-CA-9464 issued on May 4, 1976, against Donn Products, Inc. & American Metals Corporation, here together called the Respondent, on a charge filed on September 18, 1976, by United Furniture Workers Local 450, United Furniture Workers of America, AFL-CIO, here called the Union. In Case 8-RC-9998 a Board-conducted election was held on September 10, 1975; the Union filed objections to conduct allegedly affecting the results of the election. The Regional Director directed a hearing on the objections, and the two cases were then consolidated for single hearing. The issues presented are: (1) Whether the Company interfered with the election, which the Union lost, so that the results must be set

aside and a new election held; (2) whether the Respondent restrained and coerced the employees in violation of Section 8(a)(1) of the Act; and (3) whether such unfair labor practices were so aggravated and pervasive that the Respondent must be ordered now to bargain with the Union without any other election being held. Briefs were filed only by the Charging Party and the Respondent.

Upon the entire record and from my observation of the witnesses, I make the following:

Findings of Fact

I. The Business of the Company

Donn Products, Inc., and its wholly-owned subsidiary called American Metals Corporation, are engaged in the processing and production of ceiling and partition systems, with their principal place of business in Westlake, Ohio. Annually the two companies, together here constituting the Respondent, shipped products valued in excess of $50,000 directly to points outside the State of

Ohio. I find that Respondent is engaged in commerce within the meaning of the Act.

II. The Labor Organization Involved

I find that United Furniture Workers Local 450, United Furniture Workers of America, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

III. The Unfair Labor Practices

A Picture of the Case

The Union started an organizational drive among the Respondent's employees in about March 1975, and in August it filed a petition with the Board requesting an election. The Respondent consented to an election and it was held on September 10, the Union losing by a vote of 148 to 115. The Union then filed formal objections to the election and a charge accusing the Company of unfair labor practices, including unlawful refusal to bargain on request. The activities of the Respondent's agents said to have constituted both interferences warranting setting the election aside and violations of the

statute are virtually the same. For this reason, and because he felt there was merit in the unfair labor practice charge, the Regional Director ordered a hearing on the objections and issued a complaint, and then consolidated the two proceedings.

From the start of the Union's campaign and continuing to the date of the election, there was a barrage of propoganda, both written and oral, poured upon the employees by both the Union and the Company. Leaflets of all sorts were distributed, by union agents and an employee organizing committee on the one hand, and by management representatives on the other. The Union held many employee meetings and the Company did the same. And of course, as always, the Union kept telling the employees why they should select the Union as their bargaining agent, and the Company advanced one argument after another why they should vote against union representation. No charge is made that the Union violated the law in anything it told the employees in its campaign activities; the case is solely against the Company. Did any of

the things it said to the employees--in writing or in speeches-- exceed the limits of that freedom of speech spelled out in Section 10(c) of the statute? Did it promise any improvements in conditions of employment, or threaten to take away any existing benefits, in order to improperly influence the employees' votes? If so, were such promises and/or threats such as to violate Section 8(a)(1) of the Act? If the Company's propaganda fell short of illegal conduct, was it nevertheless such as to amount to interference with the election?

The complaint also alleges that on July 9, 1975, the Union demanded recognition as exclusive bargaining agent in an appropraite unit, which is precisely spelled out in the complaint. The answer admits the appropriateness of the bargaining unit there described, and admits the fact of refusal to bargain. The parties stipulated that there were, at the critical time of such demand and refusal, 287 rank-and-file employees in the unit. The General Counsel placed into evidence 156 regular authorization

cards, all signed by employees within the unit before the day of refusal to bargain. There is an attack by the Respondent upon the validity of these cards. But assuming, for the moment, that the cards are valid, at least enough of them to establish majority status in the Union, the question is then presented whether what violations of Section 8(a)(1) were committed were sufficiently "flagrant," or outrageous as to justify an affirmative bargaining order in remedy. See, N.L.R.B. v. Gissel Packing Co., 395 U.S. 575.

Violations of Section 8(a)(1)

There is testimony by employees about two major meetings of employees held by the Company shortly before the election, one on about September 5 and another on September 8, 2 days before the balloting. Principal spokesmen for the Company were Donald Brown, president, and Francis Martin, manufacturing manager. The second meeting was a dinner party, of the kind the Company holds annually, but this time the wives of the employees were for the first time also invited. Brown and Martin

spoke at length, and the employee witnesses repeated what they remembered hearing, very often of necessity paraphrasing what they had heard. The General Counsel placed into evidence about 10 leaflets -- some distributed by the Company throughout the plant and some mailed to the homes of the employees individually. The Charging Party then added to the record exhibits about 17 more pieces of campaign literature given out by the Company, again to each and every employee, almost 300 persons. The Union had to be given greater latitude in offering its evidence because an employer may very well do things before an election which may sustain objections to the election but fall short of amounting to unfair labor practices.

The end result of all of this is that the record as a whole is a massive conglomeration of repetitive vituperation by the Company, maligning criticism of the Union, its agents, its representatives and its methods. Many of the Company's attacks upon the Union, and assertions of why it would be against the interests of

the employees to join, are belabored again and again without limit. In a sense, there is an implied suggestion in this case that careful analysis of each and every phrase uttered, or written by management, will reveal prohibited coercion and restraint -- a sort of argument that if one will look carefully maybe unfair labor practices can be found. I do not think the scheme of the statute calls for such a search by the Hearing Examiner to unearth proof of misconduct by such a technique. I think, rather, given the massive quantity of the evidence as a whole, that a proper procedure would be to consider those complaint allegations which specify with some precision what it is about the Respondent's activities that is now to be faulted. I can only consider the contentions actually advanced and evaluate them in the light of the proof.

1. To start with, can it be said that when an employer bombards the employees with too many leaflets, too many letters, criticizing the Union and urging the employees against collective

bargaining, the fact of such massive campaign of itself removes its activities from the realm of permissible expression of opinion and places them in the prohibited category instead? Maybe so, but, as will appear below, that question need not be answered in this case.

2. A number of times throughout its literature, the Company referred to the unioneers as "defectors," "disloyal," "con-men," "con-artists," and even "sons of bitches." The unioneers were called "rabblerousers." More than once the Union is called a "parasite union." The argument is made, more by the Union than by the General Counsel, that the mere use of such offensive and divisive words is a form of coercion, and therefore an unfair labor practice. But the question is not whether one or the other of the contestants in a Board election behaves nicely, politely, as though it were all a "tea party," to use an ancient phrase. One need not act restrained in voicing a contrary opinion in the area of industrial relations; indeed one seldom does. Moreover, it has long been held by now that the American worker

is sufficiently sophisticated to pay little attention to inflammatory words. He does not hesitate to use them himself on the picket line.

3. In a June 17 letter to all employees President Brown wrote that whatever the Union was offering them they could as well receive directly from the Company. Adding that the Union might offer to obtain arbitration for the employees, he then said he had investigated the possibility himself, through the American Arbitration Association, that he had finalized arrangements with that group, and that thenceforth whenever "a dispute arises which can not be settled with the Company . . ." it would be disposed of through arbitration. The Respondent then formally incorporated the new arrangement with the employees in a revised employee manual distributed in August, the month proceeding the election. By thus surrendering a part of its unilateral authority over the employees' conditions of employment, the Respondent gave them a direct benefit they had not previously enjoyed. That Brown, the president, did this for the express

purpose of curbing the employees' pro-union resolve is conceded. I find that by granting this binding arbitration arrangement to the employees, the Respondent violated Section 8(a)(1) of the Act. Cf. N.L.R.B. v. Exchange Parts, 375 US 405.

4. Another widely distributed Company circular, also passed out in August, announced that in order to provide "a little extra cash" for the employees, the Company had "arranged for a preferred loan plan with National City Bank." The brochure then advised "if you need the money now, just call our personnel dept. and Mrs. Fouts will arrange for your loan."

A number of employees did obtain loans. At the hearing Martin, the plant manager, said that the invitation for employees to go to the personnel department meant only that Mrs. Fouts would then tell the employees the name of the bank officer to ask for when he went to the bank to apply for the loan. Martin also added the Company had

arranged with the bank for the borrower to repay the loan by payroll deductions, courtesy of the Respondent, which in fact the Company has been doing.

There is no other evidence in the record on this subject. If Martin told the truth, the announcement of a "preferred loan," and that "Mrs. Fouts would arrange for your loan," was a fraud upon the employees. More likely what it all meant was that the Company gave assurance to the bank that there would be payroll deductions -- in all probability arranged in advance with the borrower's signature, a form of assistance to the employee in obtaining money when he needed it. It was a clear benefit conferred, again clearly to buy the goodwill of the employees against their pro-union resolve. I find that by such announcement and the arrangement, the Respondent violated Section 8(a)(1) of the Act.

5. A precise allegation in the complaint is that at the September 8 dinner meeting, where President Martin

spoke at length on why the Union should be rejected 2 days later, he announced that the employees "could form a committee for the purpose of solving problems as to food vending machines in the plant." The only evidence on this point is agreement by Brown, at the hearing, with the following leading question put to him by the General Counsel: "Q. You said something to the effect, 'One of the things we can do is form a small committee of you fellows at the shop, because it is your money and your food, and I really don't care.'" "A. Exactly." On whether any such committee ever came about the record is silent. If this suggestion by Brown was tantamount to an unfair labor practice, it was a weak one indeed.

6. In late August, the Respondent distributed to all the employees a 14 page printed document replete with extended statements detailing the nature of collective bargaining, the duties and prerogatives of the employer when dealing with a union, the Company's past methods of treating the employees, its plans for

the future, and, in general, explaining, once again, why the employees would be better off without the Union. Among the messages thus conveyed there was one saying clearly that in place of the present system of "plant wide" bonuses, the Company was preparing, and hoped to put in effect "in the near future," a production bonus, or an operator's bonus, which would be more advantageous to the employees. At the hearing Manager Martin explained away this critically timed statement to the employees so shortly before the election as no more than reference to a long standing idea of the Respondent, and added, without contradiction, that up to the day of the hearing nothing had been done about the proposal, no new system of any kind had been devised or put in effect.

I agree with the complaint allegation that by thus promising the employees an added benefit in their employment -- regardless of whether it was ever granted-- in the middle of its antiunion campaign-- privileged as it may have been, the

Respondent violated Section 8(a)(1) still again. A comparable promise, also a violation of the statute, was voiced by President Brown on September 8, about dental insurance to the employees, when, among much more, he said "the dental program is something we should be looking at as time goes by, because it is going to get to the point where it is within the realm of possibility."

7. Another act of the Respondent, called illegal in the complaint, is that in December of 1975 it closed its Berea plant and moved the employees from there to its other two locations. Prior to that day the Company operated in three locations--Berea, Westlake, and Medina, and the employees of all three were included in the organizational campaign and together, as all parties agreed, constituted the appropriate unit. The complaint says the Respondent violated the Act when it closed the Berea location because it did so unilaterally, without first bargaining with the Union about the move. This means that before it can be found that the Act was violated in this

respect, it must be found that the Company was obligated to bargain in December notwithstanding the results of the election--adverse to the Union. There is no allegation the move constituted restraint and coercion per se. On this point Gerald Wasik, an employee, testified that during a speech to the Berea location employees before the election President Brown said "he could take the company and move it anywhere he pleases at any time," "he could just take off and move the company anywhere he chooses at any time." Brown did not contradict this testimony. But Martin, the manager of manufacturing, who was also present at the September 5 meeting, quoted Brown as saying there was a possibility the Berea plant might have to be closed and its operations moved to Medina for economic reasons, as there were insufficient orders for work there and the place was too expensive to continue. And when the Berea plant was closed, in December, all its employees--about 36--were offered transfer to the other locations and all accepted. No one was hurt economically by the move.

Economically justified as the move may have been, and there is no basis for questioning that explanation by Martin, there was no reason for the president to have talked about the possibility in terms that would of necessity tend to intimidate the employees just 5 days before the balloting. I credit Wasik's version of Brown's words, and I find that the president chose to speak of the projected move in such a way as to give the employees to understand that the Company would exercise its managerial prerogative to their disadvantage. The talk Brown was giving that day was essentially for the purpose of persuading the employees to vote against the Union. It was not the right moment to promise plant closure on any basis. I find Brown violated Section 8(a)(1) of the Act by what was in effect a threat of reprisal.

8. Dale Steyer, a member of the employee organizing committee, testified that one day early in the campaign Martin called him into the office to ask was it true he had passed out union literature

"specifically part of the Heartley Act." When he answered yes, Martin asked did he know "it is against the law." Martin closed with saying "as long as you admit it [passing out union literature], I want to make it perfectly clear to you that if you are to ever do it again that you can be fired." Steyer's final statement as a witness was that he knew, when Martin thus talked to him, the supervisor was talking about distribution of union literature on Company time.

Wasik also recalled a talk with Martin in May or June about union activities: "he told me that he did not care about any union affiliation, but if he caught me doing anything outside the law, he would prosecute me to the fullest extent of the law." The witness's earlier affidavit states Martin's admonition to him somewhat differently. ". . . he told me that he didn't care what my views were regarding a union and what activity I engaged in regarding the union as long as it was legal, but that if I engaged in any illegal activity,

he would prosecute me to the full extent of the law."

I find that by interrogating Steyer about his union activity and by threatening to discharge Steyer and to prosecute Wasik for distributing union literature in the plant, Martin violated Section 8(a)(1) of the Act. There was no rule in effect at the time regulating union solicitation or distribution on the Company premises, and, as Steyer testified, without contradiction, there had never been any such rule during prior organizational campaigns. When an employer voices direct threats of discharge for union activity in the plant, vague and oblique references to "the law," or to "Taft-Heartley," will not serve to remove the outright intimation from the area of prohibited restraint and coercion. If an employer wishes to reserve working time for work, as is its right, it must do so clearly, without equivocation or ambiguity. Hyland Machine Co., 210 NLRB 1063. Here, not only was there no understandable rule announced in advance of the union activities, but the

manager took no pains to assure the employees of their protected rights.

9. Twice in August, when Steyer was in the office of Allen, the production manager superintendent, Allen started talking of the Union with the employee. According to Steyer, the first time "He asked me, 'I understand there wasn't too many people showed up at the meeting. How was the turnout last night?'" Steyer answered "I would like to terminate that part of the conversation." Allen continued nevertheless as follows: "Not too many guys showed up . . . Was it the same old crowd?" A week later: ". . . he made reference to the union again, and that I was becoming pretty heavily involved in the union campaign. I said, 'Well, by now, that's pretty common knowledge. I am on the Organizing Committee.' He said, 'Well, you know, people in the front office are making remarks . . . people around here have long memories, and if you people should happen to lose, then . . . in a year, they have long memories . . . everybody breaks rules

now and then, and for the most part, if they are not serious violations, they will let it go . . . Perhaps in your case they may not let it fly by.'"

Allen's story is that it was Steyer who always started talking union because he was worried about how "secure" his position was, about possible "reprisals" by the Company against a member of the employee organizing committee. At one point the superintendent said it was always Steyer who brought up the subject of the Union in their talks. But he also said the employee came in "repeatedly after anytime we would have one of our handouts, a meeting in which his name was named, he would come in . . . ." It then became clear that what the witness was saying was that Steyer has been discussed by management in its meetings always just before the Union was discussed between the two in private conversation.

Q. You did mention something that Dale [Steyer] would come in whenever his name would come up in a meeting?

A. That's true.

Q. That his name was used in meetings by the Company then?

A. Not so much his name as the group of organizers in the plant.

Q. Their names came up quite a bit?

A. It was a general kind of thing, perhaps not specifically named but addressed to the organizing committee in the plant.

If the superintendent talked of the Union with Steyer after the employee's name had been discussed in the inner-councils of management, it follows it had to be Allen who started the talk. How else could Steyer know that he had been the subject of comment by his supervisors in conference? With this, plus Allen's general demeanor at the hearing, I credit Steyer and I find that Allen interrogated him about the union activities of other employees and threatened him with possible sterner discipline in the

future if he persisted in his activities with the organizing committee. By such conduct of Allen the Respondent again violated Section 8(a)(1) of the Act.

10. A final complaint allegation is a blunderbus assertion that by the totality of its conduct -- including the extended speeches to assembled employees and unending writings handed to each of them -- the Respondent made them understand that if ever it were faced with the legal duty to bargain with the Union it would simply refuse to do so in good faith, that it would arbitrarily frustrate the entire collective bargaining process -- Section 8(a)(5) or no Section 8(a)(5). On this score the evidence is nebulous, vague, indirect, and the oral testimony of employees more argument than clear statement of fact. Again and again they spoke of what management agents said "in effect," gave their understanding of what they were being told in words without end, and simply responded to conclusionary leading questions. On the very lengthy testimony and voluminous documents here received,

this question is comparable to the frequent issue of whether an employer bargains hard or in bad faith.

Brown did say " you can lead a horse to water, but you couldn't make him drink." ". . . you could force the horse to drink, but at times you almost drown the horse before he will take a drink of water." He also spoke of what happens when unions strike, and how the Respondent would prepare to defend economically against such pressure, dramatically explaining how employees suffer in such cases. A critical phrase, quoted by the employees a number of times, was that the bargaining would start "from scratch." At the start the witnesses made ever effort to convey the thought that what the president was saying was that his first position in possible negotiations would be that the employees work for nothing, receive no benefits at all for their work, but would only get anything if the horse were forced to drink. It then became clear that the managers told the employees both in writing and orally that whatever wages or other benefits they were then enjoying

would in no event be lost, and only that raises or other new benefits would have to be extracted with difficulty from the employer. This one aspect of the general charge of "bad faith promised" illustrates much of the testimony.

After carefully considering all the record, I do not think a factual finding is warranted that the Respondent did announce in advance that if the Union were certified it would violate the Act by not bargaining in good faith. In fact, the witnesses even admitted that at times Brown said exactly those words: that he would bargain "in good faith."

Refusal to Bargain: Affirmative Bargaining Order?

In the light of the unlawful restraint and coercion type of unfair labor practices committed by management before the election, it is clear there is merit to the Union's exceptions and that the results of the election must be set aside. If the Union desires a new election must be held when the Regional Director deems proper.

But the real, substantive question in this case is whether the unfair labor practices committed were of such a character that it must be held they now "preclude the holding of a fair election." Restated, the question becomes whether it can reasonably be expected that the Board's usual remedial order -- posting of notices and a cease and desist order directed to the Respondent -- will serve to dissipate the intimidating and coercive effect of the past improper conduct by management representatives. It is an area of Board law where no single prior decision of the Board can be determinative precedent for a following one because no two sitatuions are ever truly parallel. No one was actually hurt or prejudiced in his employment despite the unending talk carried on by the Respondent. There was no violation of Section 8(a)(3) of the Act; indeed none is alleged. The move of the Berea employees to Medina was not illegally motivated; it was caused by economic necessity, and concession on this point by the General Counsel logically means the employees were equally aware of

such objective reality. And what benefits were promised were more illusory than real. Brown spoke of one day establishing a better production bonus system, but nothing was ever done about that. The right to arbitration over employee complaints is a thing of value, and interrogation is a form of coercion. But if, as the Supreme Court said in U.S. v. Gissel, supra, unfair labor practices are to be classed into minor and major categories, surely the ones committed here must fall into the lesser class, those which may not be called "flagrant," or "egregious." After careful consideration of all the factors relevant here to this basic issue, I conclude that an affirmative order to bargain in remedy is not warranted.

Were is necessary to decide, I would find that the Union in fact had been authorized to bargain on their benefit by a majority of the employees in the appropriate bargaining unit on July 9, 1975, when, as the complaint alleges and as the Respondent admits, there occurred the demand and refusal. The parties

stipulated that there were that day 287 employees at work; an exhibit listing the names was placed in evidence. To this number must be added Michael Kalus, because the parties also agreed his "termination date" was July 9.

There were received into evidence 156 regular authorization cards, all dated on or before July 9, 1975, all alike, and all in unambiguous language authorizing the Union to bargain forthwith on behalf of the individual employees who signed them. The cards all read as follows:

United Furniture Workers of America
Local 450, AFL-CIO

I hereby request and accept membership in the above-named Union, and of my own free will authorize it, its agents or representatives to act for me as collective bargaining agency in all matters pertaining to pay rates, wages, hours of employment and other conditions of employment.

Of these cards, 50 were authenticated at the hearing in person by the employees who signed them. The signatures to 29 additional cards were authenticated by the oral testimony of witnesses who said they saw the employees sign the cards. And 77 cards were authenticated by witnesses who testified in each instance that the cards were handed to them by the signing employees within moments after they had signed, in intimate gatherings where the cards were passed out in solicitation and where immediate signing took place.

The Respondent attacks the validity of these cards on two asserted grounds. The first is that employees did not intend what the plain printed language says - i.e., that the Union be their bargaining representative, but only that an election might be held. The test now, of course, is not what employees may later say their intent once was, but rather what they were told at the time of signing the cards. Absent clear and probative proof that union representatives, or other solicitors to signatures, ex-

pressly told the employees at the time that the sole reason for signing was to obtain an election, it is the wording of the cards -- the plain English there written and which everyone of the employees involved read before signing -- that must govern.

Several union meetings were held in March, when about half of the cards were signed, and a number of meetings took place later. Donald Rieger, international representative of the Union, was present at all the meetings. Robert Sebera, business representative, was present at six or eight meetings. I do not believe there is adequate evidence to impair any of the cards on the ground the employees were told the purpose was solely for an election. Both Riger and Sebera testified clearly and convincingly that a number of times the employees were told the cards were to be used to make immediate demand for recognition, and that only in the event recognition were not achieved, would the Union move towards an election. Each of the union agents denied they ever told the employees the purpose of the

cards was only to bring about an election.

Several employees who authenticated their cards also spoke on this subject but their testimony cannot offset the writing on the cards they read before signing. They did recall there was talk of an election, and yet, from Larry Doehr: "All it was an indication that you are interested in obtaining this particular union as a bargaining agent." Neil Barrett said he heard an organizer say that "if you sign that then they need, I think, 50 percent or something that they were telling me and that would be enough to vote for a union, to have the vote for a union." Another employee, Donald Ulrich, quoted an organizer as saying "that if a certain percentage of the cards were turned in, there would be an election," and that "they would like a certain percentage of the cards in before they would even try for an election, ..." Randolf Rusnak started by saying no one from the Union told him why they wanted the cards signed, and then added: "They just wanted to take like a poll to see how

many people would be interested."

The second contention adverse to the validity of the cards is that the Union illegally bribed the employees by promising them freedom from initiation fees or dues on condition that they sign before the election, or before the Union won recognition. On this score, too, the testimony of the two most active union agents who ran the organizational campaign could not be clearer. Riger testified he told the employees: "Dues were $8 a month. Employees were told that. They were also told there was no initiation fee for any present employees." He denied telling any employees "if they signed, a union card they would not have to pay union dues . . . initiation fees." "We said that dues would be first collected after a contract was signed, and we said there would be no initiation for any present Donn employees, and we also stated that in the leaflet as well." From the testimony of another employee, Terrence Keane: "Somebody told me the rule, and I can't tell you who told me, but somebody told me that anybody who was working, that

is working at the company when the Union gets in, doesn't have to pay. It is whoever comes in afterwards." And the other union agent, Sebera, said: "We told the people present that definitely in all cases that there will be no Union dues or no initiation charge up until the time that the contract is consummated with the Company."

The union meetings started in March, and the campaign continued for several months thereafter. On April 1 the Company distributed to each of the almost 300 employees a printed document entitled Opinion Poll, with the following statement:

> I understand there is a rumor being circulated through the plant concerning the payment of the union initiation fees. A loyal employee informed me that you have been told if you did not sign a union card now that in the event the union wins an election you would be required to pay an initiation fee and those who did

> sign the card would not have to pay any fee.

This paper then asked each employee to check whether this statement by the employer was or was not his "understanding." Ten employees checked the affirmative box in reference to that question. How many of the other 277 employees said "No," the record, of course, does not show.

These 10 answers are of no significant weight against the validity of the cards, including those signed by the special 10 employees. Rumor, absent factual evidence, will not suffice to support what is essentially an affirmative defense. One must also ask: "What is a rumor? Who starts a rumor?" When an employer floods the plant with a flat statement that there <u>is</u> a rumor, who is it that has started the rumor?[1] It was

---

[1] The nature and ingenuity of man is unchanged as of old. Cf. <u>Virgil, Aeneid</u>, BK. IV, L. 160-161; Rossini, <u>The Barber of Seville</u>, Act 3, "LaCalumnia."

an obvious device to create, and implant into the minds of the employees, what is now called a Savair defense. See N.L.R.B. v. Savair Mfg. Co.,414 U.S. 270.

The Respondent called some witnesses who, in part of their testimony, said they heard the union agents tell the employees in the one or two meetings they attended, that dues and fees would be waived only if they signed now. I do not credit these witnesses against the clear testimony of Rieger and Sebera.

Givens, chief inspector of quality control, said he heard Rieger say "if anybody would get a Union card and mail it in at this time, that they would be exempt from paying any initiation dues." The witness added this was the only meeting he attended, and that he did not stay throughout.

Keifer, assistant foreman, testified: "He said that if union cards were signed now, that there wouldn't be any initiation fee if you signed a card now." This witness said he heard no talk in the shop to this effect. He could not recall what date or what month he went to the meeting,

what questions he asked or what questions the other employees asked.

Mehlman, an inspector, said: ". . . at one of the meetings it was stated that if we had a card signed and in by the time the election came up, we would not be liable for initiation dues." The witness then added Sebera, at a meeting, "confirmed it." And then, on cross-examination, came the following:

> Q. Do you recall at any of these meetings, either Mr. Rieger or Mr. Sebera stating that there would be no dues or initiation fees until a contract was signed between the Company and the Union?
>
> A. Yes, I heard that also.

Kaniecki, then quality control assistant foreman and now quality control foreman, started by saying that at a meeting he heard Rieger and Sebera say "that any of the guys that signed a petition card during a campaign would be exempt from paying initiation fees." Like

Mehlman before him, Kaniecki then reversed himself:

> Q. Did you hear Mr. Rieger or Mr. Sebera make a statement that no employee would have to pay a Union initiation fee until after a contract had been signed with Donn Products?
> A. Yes.

Lee Townsend, an ordinary employee, was also called by the Respondent. Asked in his opening statement what the employees were told in the meeting about payment of initiation fees, he answered: "That they would be after negotiations were taken care of." With some prodding by Company counsel the witness then said that those who signed cards would not have to pay. His later answer followed a series of leading questions. Finally, Townsend said he arrived late at the meeting, and did not recall with exactness what was said.

With talk, as was to be expected, about the plant, of rumors of one kind or another, the Union promptly distributed another leaflet, clearly reassuring the employees of its earlier message that there would be no dues or initiation costs on anybody until after the Union had become established. Where the testimony of the Company's five witnesses as shown above conflicts with that of the union agents, I credit Rieger and Sebera.

On the total record, I find that the Union in fact represented a majority of the 287 employees in the bargaining unit on July 9, 1975, when the Respondent refused to extend exclusive recognition on request.

The Effect of the Unfair Labor Practices upon Commerce

The activities of the Respondent set out in section III, above, occurring in connection with the operations of Respondent described in section I, have a close, intimate and substantial relation to trade, traffic and commerce among the

several states and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

Conclusions of Law

1. By granting its employees a binding arbitration agreement in order to dissuade them from prounion activities, by establishing an unprecedented system of materially assisting employees to obtain personal bank loans, by threatening to move its business to other locations, by interrogating employees about their union activities and about the union activities of other employees, by threatening to discharge employees and to prosecute them because of their union activities, by telling employees they would be disciplined more harshly because of their union activities, and by promising employees an improved bonus system to induce them to abandon the Union, the Respondent has engaged in and is engaging in violations of Section 8(a)(1) of the Act.

2. The aforesaid unfair labor practices are unfair labor practices

affecting commerce within the meaning of Section 2(6) and (7) of the Act.

Upon the foregoing findings of fact, conclusions of law and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:[2]

ORDER

The Respondent, Donn Products, Inc. & American Metals Corporation, Westlake, Ohio, its officers, agents, successors and assigns, shall:

1. Cease and desist from:

(a) Granting its employees a binding arbitration agreement in order to dissuade them from prounion activities, establishing an unprecedented system of materially assisting employees to obtain

[2]In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions and Order, and all objections thereto shall be deemed waived for all purposes.

personal bank loans, threatening to move its business to other locations, interrogating employees about their union activities and about the union activities of other employees, threatening to discharge employees and to prosecute them because of their union activities, telling employees they would be disciplined more harshly because of their union activities, or promising employees an improved bonus system to induce them to abandon the Union.

(b) In any other manner interfering with, restraining, or coercing employees in the exercise of the right to self-organization, to form, join, or assist United Furniture Workers Local 450, United Furniture Workers of America, AFL-CIO, or any other labor organization, to bargain collectively through representatives of their own chosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any and all such activities.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Post at its places of business in Westlake and Medina, Ohio, copies of the notice attached hereto and marked "Appendix."[3] Copies of said notice on forms provided by the Regional Director for Region 8, after being duly signed by its representatives, shall be posted by the Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily

[3] In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

posted. Reasonable steps shall be taken by it to insure that said notices are not altered, defaced or covered by any other material.

(b) Notify the Regional Director for Region 8, in writing, within 20 days from the date of receipt of this Decision, what steps the Respondent has taken to comply herewith.

In the light of this total record I find no merit in the Respondent's contention that because a copy of the Union's objections to the election in Case 8-RC-9998 was served upon it belatedly, the misconduct now shown to have occurred before the election should be ignored. Accordingly, I recommend that the results of the election be set aside and that the Regional Director conduct a new election when in his judgment he deems proper.

Dated at Washington, D.C.

Thomas A. Ricci
Administrative Law
Judge

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the

National Labor Relations Board

An Agency of the United States Government

THE NATIONAL LABOR RELATIONS BOARD HAVING FOUND, AFTER A TRIAL, THAT WE VIOLATED THE FEDERAL LAW BY COMMITTING ACTS OF ILLEGAL COERCION:

WE WILL NOT grant our employees a binding arbitration agreement in order to dissuade them from prounion activities.

WE WILL NOT establish an unprecedented system of materially assisting our employees to obtain personal bank loans to curb their union activities.

WE WILL NOT threaten to move our plant to other locations to discourage union activities.

WE WILL NOT interrogate our employees about their union activities or about the union activities of other employees.

WE WILL NOT threaten to discharge employees or to prosecute them because of their union activities.

WE WILL NOT tell our employees that they will be disciplined more harshly in the future because of their union activities.

WE WILL NOT promise an improved bonus system to induce our employees to abandon the Union.

WE WILL NOT in any other manner interfere with, restrain or coerce our employees in the exercise of their right to self-organization, to join or assist UNITED FURNITURE WORKERS LOCAL 450, UNITED FURNITURE WORKERS OF AMERICA, AFL-CIO, or any other labor organization, or to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection or to refrain from any and all such activities.

DONN PRODUCTS, INC. &
AMERICAN METALS CORPORATION
(Employer

Dated_____ By_____
Representative

_____
Title

This is an official notice and must

not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Suite 1695, Anthony J. Celebrezze, Federal Building, 1240 E. 9th Street, Cleveland, Ohio 44199 (Tel. No. 216-522-3739).

No. 77-1269
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DONN PRODUCTS INC. and
AMERICAN METALS CORP.,
Petitioners,
v. O R D E R
NATIONAL LABOR RELATIONS BOARD,
Respondent.
BEFORE: WEICK, LIVELY and KEITH,
Circuit Judges.

On petition for review and Cross-Application for Enforcement of an Order of the National Labor Relations Board,

This cause came on to be heard on the record of proceedings before the National Labor Relations Board and was argued by counsel.

On consideration whereof, it is now ordered, adjudged and decreed by this Court that the findings of section 8(a)(1) violations by the Board, with the exception of the finding of a threat of sham bargaining, are affirmed.

The finding by the Board of a section 8(a)(5) violation is reversed. The order of the Board is enforced with exception of paragraphs 1(a), 1(d), 2(a) and 2(b). Enforcement of these excepted provisions of the order is denied. The notice to employees which the Board ordered posted will be modified to reflect the partial denial of enforcement. This will require deletion of all references to bargaining with the union and removal of literary paragraphs 1, 4, 12, 14 and 15 from the notice.

No costs allowed.

ENTERED BY ORDER OF THE
COURT

(John P. Hehman)
Clerk

Filed January 17, 1980

No. 79-1624

In The

Supreme Court of the United States

October Term, 1979

LOCAL 450, UNITED FURNITURE WORKERS OF AMERICA, AFL-CIO,
Petitioner,

vs.

DONN PRODUCTS, INC., and AMERICAN METALS CORP.,

and

NATIONAL LABOR RELATIONS BOARD,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF DONN PRODUCTS, INC. AND AMERICAN METALS CORP. IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

DANIEL W. HAMMER
1100 National City Bank Building
Cleveland, Ohio 44114
(216) 241-1880
Attorney for Respondents Donn Products, Inc. and American Metals Corp.

Of Counsel:
THOMPSON, HINE AND FLORY
KEITH A. ASHMUS
LEE G. MEYER
General Counsel
Donn, Inc.

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) 621-5647

TABLE OF CONTENTS

Questions Presented 2

Statement of the Case 2

Reasons for Denying the Petition 5

I. The decision of the court of appeals neither conflicts with any decision of this Court or any court of appeals, nor involves any important but unsettled question of federal law 5

II. The decision below was correct in denying enforcement of the bargaining order 11

Conclusion 13

Addendum:

Letter, March 27, 1980, National Labor Relations Board to Counsel for Other Parties 14

TABLE OF AUTHORITIES

Cases

Armcor Industries, Inc., 227 N.L.R.B. 1543 (1977), *enf. denied on other grounds*, ... F.2d ....., 98 LRRM 2441, No. 77-1495 (3rd Cir. 1978) 8

First Lakewood Associates v. N.L.R.B., 582 F.2d 416 (7th Cir. 1978) 11

Gold Circle Department Stores, 207 N.L.R.B. 1005 (1973) 6

The May Department Stores Company, 211 N.L.R.B. 150 (1974) 6

N.L.R.B. v. Appletree Chevrolet, Inc., 608 F.2d 988 (4th Cir. 1979) 6
N.L.R.B. v. Armcor Industries, Inc., 535 F.2d 239 (3rd Cir. 1976) 6, 11
N.L.R.B. v. General Stencils, Inc., 472 F.2d 170 (2nd Cir. 1972) 6
N.L.R.B. v. Gibson Products Co. of Washington Parish, La., Inc., 494 F.2d 762 (5th Cir. 1974) 6
N.L.R.B. v. Gissel Packing Co., 395 U.S. 575 (1969) 7, 9, 11
N.L.R.B. v. Jamaica Towing, Inc., 602 F.2d 1100 (2nd Cir. 1979) 6, 11
N.L.R.B. v. Pacific Southwest Airlines, 550 F.2d 1148 (9th Cir. 1977) 6
N.L.R.B. v. Pilgrim Foods, Inc., 591 F.2d 110 (1st Cir. 1978) 6, 11
N.L.R.B. v. World Carpets of New York, Inc., 463 F.2d 57 (2nd Cir. 1972) 6
Peerless of America v. N.L.R.B., 484 F.2d 1108 (7th Cir. 1973) 6
Universal Camera Corp. v. N.L.R.B., 340 U.S. 474 (1951) 9

Statutes

29 U.S.C. §158(a)(1), Labor Management Relations Act of 1947, as amended, §8(a)(1) 3, 9, 10

No. 79-1624

In The

Supreme Court of the United States

October Term, 1979

LOCAL 450, UNITED FURNITURE WORKERS OF AMERICA, AFL-CIO,
Petitioner,

vs.

DONN PRODUCTS, INC., and AMERICAN METALS CORP.,

and

NATIONAL LABOR RELATIONS BOARD,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF DONN PRODUCTS, INC. AND AMERICAN METALS CORP. IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Donn Products, Inc. and American Metals Corp., respondents herein (the "Company"), submit that this Court should not grant the Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit (the "Petition") in this case.

QUESTIONS PRESENTED

The "Questions Presented" in the Petition of Local 450, United Furniture Workers of America AFL-CIO (the "Union") are not fairly expressed in the actual terms and circumstances of the case. Accordingly, the Company contends that the following restatements of questions one and two are more proper.

1. In determining whether to enforce an order of the National Labor Relations Board (the "Board") requiring an employer to bargain with a union that lost an election allegedly because of employer unfair labor practices, should a court of appeals consider the failure of the Board to find, based on substantial evidence in the record, that the unfair labor practices either, had any continuing impact or were likely to be repeated?

2. In determining whether to affirm a finding of the Board that an employer, in a speech to employees, had threatened to refuse to bargain, should a court of appeals review the entire speech as it appears in the record, or is it limited to a consideration of only those isolated excerpts from the speech relied upon by the Board?

STATEMENT OF THE CASE

Beginning in March, 1975, the Union conducted an organizing campaign among employees of the Company. On July 9, 1975, the Union claimed that it had acquired authorization cards from a majority of employees. An election was held on September 10, 1975 pursuant to a petition filed by the Union with the Board. The Union lost the election by a vote of 148 "no" to 115 "yes."

The Union thereafter filed unfair labor practice charges, and also filed objections to conduct affecting the results of the election. The two proceedings were consolidated and a complaint was issued by the Board. Following a hearing in July and August, 1976, Administrative Law Judge Thomas Ricci (the "ALJ") issued a Decision and Recommended Order on October 18, 1976, finding the Company to have committed certain unfair labor practices in violation of §8(a)(1) of the Labor Management Relations Act of 1947, as amended, 29 U.S.C. §158(a)(1) (the "Act"), which he characterized as "minor," and ordering a new election.

All parties excepted to the ALJ's decision. The Board reviewed it and issued its Order on April 20, 1977, affirming the ALJ with the exception of finding an additional §8(a)(1) violation and ordering the Company to bargain with the Union, 229 N.L.R.B. 116 (1977). The Company petitioned for review of the Board's Order in the United States Court of Appeals for the Sixth Circuit, and the Board cross-petitioned for enforcement of its Order.

On January 17, 1980, the court of appeals entered its judgment denying enforcement to those portions of the Board's Order relating to the additional §8(a)(1) violation found by the Board and to the order to bargain, 613 F.2d 162 (6th Cir. 1980).

The representation campaign that led to this litigation was vigorously conducted by both sides. While the vast bulk of the campaign materials and methods of the Company either was of unchallenged legality or was found to have been proper, certain unfair labor practices were found.

Although the Company continues to contend that none of its acts constituted unfair labor practices, it is also

the position of the Company that even if, *arguendo,* some of its conduct amounted to a technical violation of the Act, that conduct was not of a nature sufficient to undermine the Union's support. Thus, among the unfair labor practices focused upon by the Board, several occurred *before* the Union achieved its asserted majority status.* All but one of the others consisted of statements that were not on their face promises of benefits or threats, but were implied to be so by the Board. None were shown to have had any effect on support for the Union, and none were shown to have had any continuing effect.

As already stated, the Company contends that it has not committed any unfair labor practices, but, in the interest of having an end to litigation, it has complied with the Board's Order as enforced by the court of appeals. The benefits found to have been unlawfully granted are no longer in effect and the required notice has been posted at the request of the Board. The Board, for its part, although it has been on the opposite side of the case from the Company throughout this litigation, and is the party most affected by the questions raised in the Petition, has also accepted the judgment of the court of appeals.

---

*Contrary to the Union's representation in the Petition (Petition 9), the arbitration provision that was added to a preexisting grievance procedure went into effect immediately upon its announcement in June, 1975 (A-45). [References are to pages of the Petition or the Appendix to the Petition.]

REASONS FOR DENYING THE PETITION

I THE DECISION OF THE COURT OF APPEALS NEITHER CONFLICTS WITH ANY DECISION OF THIS COURT OR ANY COURT OF APPEALS, NOR INVOLVES ANY IMPORTANT BUT UNSETTLED QUESTION OF FEDERAL LAW

The first "Question Presented" by the Union sets up an "issue" that is not fairly present in this case. Thus, contrary to the premise for the Union's first question, the court of appeals did not hold that a bargaining order was not warranted "simply because the Company discontinued its illegal activity" (Petition 3). What the court found was that the record did not establish a need for a bargaining order in the face of the rejection of the Union by the Company's employees in the election and that the Board had failed in its obligation to base its conclusory statements on findings supportable on the record.

In the words of the court:

> There is nothing in the record to indicate that any of the violations are of a continuing nature. . . . The Board made no findings or detailed analysis as to the residual impact or continuing effect, or the likelihood of recurrence, of any of the unfair labor practices. . . . While we are required to respect the special expertise of the Board, particularly in the formulation of remedies, courts are not required to enforce bargaining orders based on conclusory statements unsupported by sufficient facts. . . .
>
> Our study of the entire record convinces the court that this was not a proper case for a bargaining

> order. There was a hard-fought campaign, but the classic tactics of discharge and widespread discrimination against and harassment of union sympathizers were not present. . . . The unfair labor practices which occurred were of a kind whose effect would quickly dissipate. (Citations and certain other statements omitted) (A-7, 8).

Since the Board itself has held that such factors as the continuing nature of violations and their susceptibility to correction by traditional remedies are important for deciding the appropriateness of a bargaining order, *Gold Circle Department Stores*, 207 N.L.R.B. 1005 (1973), *The May Department Stores Company*, 211 N.L.R.B. 150, 152 (1974), the court's focus upon those factors presents no question of importance to the relationship between the Board and the reviewing courts of appeals. Further, every court of appeals that has considered the matter has held that such factors are relevant, that the Board has a duty to analyze them, and that, if the Board fails to discharge this duty, its unsupported conclusions cannot be the basis for an enforceable order. *See, e.g., N.L.R.B. v. Pilgrim Foods, Inc.*, 591 F.2d 110 (1st Cir. 1978); *N.L.R.B. v. World Carpets of New York, Inc.*, 463 F.2d 57, 62 n.6 (2nd Cir. 1972); *N.L.R.B. v. General Stencils, Inc.*, 472 F.2d 170, 174 (2nd Cir. 1972); *N.L.R.B. v. Jamaica Towing, Inc.*, 602 F.2d 1100, 1103-1104 (2nd Cir. 1979); *N.L.R.B. v. Armcor Industries, Inc.*, 535 F.2d 239, 244-45 (3rd Cir. 1976); *N.L.R.B. v. Appletree Chevrolet, Inc.*, 608 F.2d 988, 997 (4th Cir. 1979); *N.L.R.B. v. Gibson Products Co. of Washington Parish, La., Inc.*, 494 F.2d 762, 766-67 (5th Cir. 1974); *Peerless of America v. N.L.R.B.*, 484 F.2d 1108, 1118 (7th Cir. 1973); *N.L.R.B. v. Pacific Southwest Airlines*, 550 F.2d 1148, 1151-52 (9th Cir. 1977). Thus, there is no conflict among the circuits, and there really could not be, since

this Court has already specifically affirmed that those precise factors considered by the court of appeals but ignored by the Board in this case are to be weighed by the Board:

> In fashioning a remedy in the exercise of its discretion, then, the Board can properly take into consideration the extensiveness of an employer's unfair practices in terms of their past effect on election conditions and the likelihood of their recurrence in the future. If the Board finds that the possibility of erasing the effects of past practices and of ensuring a fair election (or a fair rerun) by the use of traditional remedies, though present, is slight and that employee sentiment once expressed through cards would, on balance, be better protected by a bargaining order, then such an order should issue.

N.L.R.B. v. Gissell Packing Co., 395 U.S. 575 at 614-615 (1969).

The Union's suggestion that the court of appeals in this case determined the possibility of a fair rerun election as of the date of the decision by the court of appeals is not supported by the record. Indeed, the court specifically found that "[T]he unfair labor practices which occurred were of the kind whose effect would quickly dissipate." (A-8). The Union argues that the Board itself looks to the seriousness of the unfair labor practices as of the time they were committed in fashioning its remedy, but this is contrary to established Board precedent.

> [I]n our view the validity of a bargaining order in this case and in similar cases should properly rest upon our analysis of the seriousness and pervasiveness of the unlawful conduct at the time that conduct was first presented for our scrutiny. . . .

Armcor Industries, Inc., 227 N.L.R.B. 1543, 1545 (1977), *enf. denied on other grounds,* ..... F.2d ....., 98 LRRM 2441, No. 77-1495 (3rd Cir. 1978). In the present case, the Board failed to discharge its duty by neglecting to assess the impact at any time.

The record contains many examples of how the Board did not properly consider the impact of the unfair labor practices on the Union's asserted majority status or on the possibility for a fair rerun election. Thus, whereas the Board relied heavily upon the alleged threats to and interrogation of two employees, those "threats" were made only in one-on-one contacts, were never publicized to any other employees, did not affect the continued activism of the employees who were allegedly threatened or interrogated, and, significantly, took place *long before* the Union obtained the majority status that the threats allegedly dissipated. Similarly, the arbitration "benefit" relied upon by the Board was granted *before* the Union obtained majority status. The alleged "threat" to close a plant consisted of a statement that the plant could be moved, and a move to a neighboring town was being considered for economic reasons that did, in fact, result in a transfer of operations a few months after the election, with no loss of jobs to any of the employees.* Hence, at the time of the Board's "scrutiny" it could not have affected any rerun election.

Ignoring all of this, the Board, in the most conclusory language, stated, "In our view there is little or no likelihood that a second and fair election could be conducted in the face of the Respondent's far-reaching unfair labor practices"

*Significantly, the transcript of the speech (at 453 of the Record) shows that there was no statement that the outcome of the election or employee support for the Union would have any effect on the decision to move.

(A-19). It is little wonder that the court of appeals took the Board to task for failing to explicate reasons to support its conclusions.

This case thus involves no question vital to the administration of the Act, or to the relationship between the Board and reviewing courts. The decision does not point to any conflict among the various courts of appeals, or any failure of the lower courts to follow the directives of this Court. Were those factors present, the decision most certainly would have been appealed by the Board itself. All that is involved is the failure of the Board in this case to address the considerations this Court in *Gissel* defined as important in fashioning a remedy once unfair labor practices are found.

The second "Question Presented" in the Petition again states an issue not really present in the decision. The court of appeals did not, as claimed by the Union, "ignore both the Board's expertise in the field of labor relations and the substantial evidence test by brushing aside the identifiable and specific portions of an employer's speech to employees relied upon by the Board. . . ." To the contrary, the court considered them carefully (A-3, A-5). What the court did do, however, was to apply the "substantial evidence" test correctly. That is, unlike the Board which relied upon out-of-context excerpts from the record, the court reviewed the record as a whole. The "substantial evidence" test requires deferral to the Board's expertise—but only if the Board's findings are supported by substantial evidence when the entire record is considered. *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474 (1951).

The Petition relies wholly upon the Union's perceptions that the court failed to determine whether there

was substantial evidence to support the Board's finding, and that the court simply chose to agree with the conclusions of the ALJ, thereby undermining the expertise supposedly residing in the Board. Thus, the Union's Petition baldly asserts, "The Court never states that the Board's ruling is unsupported by substantial evidence, but merely chooses to 'agree with the Administrative Law Judge. . . .'" (Petition at 43-44). It is shocking that the Union could have ignored the court's explicit statement on this crucial point:

> We conclude, however, that the finding of the Board, in disagreement with the administrative law judge, that the company threatened to engage in sham bargaining is not supported by substantial evidence when the entire record is considered. (A-4).

It is obvious, therefore, that the substantial evidence rule was endorsed and followed by the court.

The third "Question Presented" deals with the issue of whether the court below should have remanded the case to the Board for consideration of whether a bargaining order was warranted in the absence of one of the §8(a)(1) violations found by the Board. Again, no important question is presented. There was no need for the court to remand the case to the Board for reconsideration of the remedy because the Board had already affirmed the ALJ's findings as to the effects and character of all of the unfair labor practices except for the alleged threat of sham bargaining. The Board did not disturb the ALJ's findings that the benefits allegedly promised were more illusory then real, that the employees were aware of the economic necessity of the plant closing, and that no one was actually hurt in his or her employment (A-61, 62). The timing of the violations found in relation to the attainment of the

alleged majority status was also apparent from the record. Thus, the court had before it findings of the Board, affirming the ALJ, that demonstrated that a bargaining order was not warranted, particularly since the effect of any violations would have quickly dissipated (A-8). In such circumstances, a remand would have been pointless and would only have delayed the ultimate resolution of the case. *First Lakewood Associates v. N.L.R.B.*, 582 F.2d 416, 423-24 (7th Cir. 1978); *N.L.R.B. v. Pilgrim Foods, Inc.*, 591 F.2d 110 (1st Cir. 1978).

II. THE DECISION BELOW WAS CORRECT IN DENYING ENFORCEMENT OF THE BARGAINING ORDER

As already noted, the Board failed to consider certain key factors in determining whether the unfair labor practices found by it justified a bargaining order. As *Gissel* held, usually when unfair labor practices have been committed during an election campaign, the Board's usual remedies are sufficient and the extraordinary remedy of a bargaining order is not proper. Only in more extreme cases, where the possibility of a fair rerun election is slight, is a bargaining order based upon a dissipated card majority appropriate. The Board must state its basis for deciding which cases belong in which category, *Jamaica Towing, supra* at 1105. By doing so, the Board not only enables reviewing courts and litigants to understand its reasoning and provides guidance in a difficult area of labor relations law, it also protects the employees from an unwarranted imposition of a bargaining agent. *N.L.R.B. v. Armcor Industries, Inc.*, 535 F.2d 239, 245 (3rd Cir. 1976).

The Board did not explain its rationale in this case. As the court found, the evidence in support of many of the

alleged unfair labor practices was marginal. The card-based majority was narrow, and most of the campaign consisted of materials and communications that were perfectly proper. The Company had never before been found to have committed any unfair labor practices, nor has it since been the subject of any complaint filed by the Board. There was no reason to believe at any time that the alleged unfair labor practices could not be remedied by a standard order, that once so remedied they or any others would be committed, or that a fair rerun election could not be held as well in 1975 as in 1980.

It is significant to note that it is the Union, and not the Board, that takes umbrage with the decision of the Court of Appeals. The Board is satisfied that the decision does not merit review by this Court (Addendum). It has taken immediate steps to implement the order of the court of appeals and has not voiced the first suggestion that this decision has crippled its ability to administer the federal labor laws.

CONCLUSION

None of the "Questions Presented" in the Petition is of sufficient import to justify consideration by this Court. The Court of Appeals for the Sixth Circuit did not apply a new rule on the time for assessing the impact of unfair labor practices on Board elections, nor did it disregard the substantial evidence test. It also had before it a sufficient basis on the Board's own findings to justify choosing not to remand on the remedy issue. The decision of the court below on the matters relevant to the Petition was correct, and the Board itself has not seen fit to initiate a request for review by this Court.

This is not a case that warrants the granting of a petition for a writ of certiorari.

Respectfully submitted,

DANIEL W. HAMMER
1100 National City Bank Building
Cleveland, Ohio 44114
Attorney for Respondents
Donn Products, Inc. and
American Metals Corp.

Of Counsel:
THOMPSON, HINE AND FLORY
KEITH A. ASHMUS
LEE G. MEYER
General Counsel
Donn, Inc.

ADDENDUM

Letter, March 27, 1980, National Labor Relations Board to Counsel for Other Parties

NATIONAL LABOR RELATIONS BOARD
REGION 8
Anthony J. Celebrezze Federal Building, Room 1695
1240 East Ninth Street
Cleveland, Ohio 44199 Telephone (216) 522-3715

March 27, 1980

Leo H. Litowich, Esq.
700 Commerce Building
Grand Rapids, Michigan 49503

Norton N. Newborn, Esq.
1700 Investment Plaza
1801 East 9th Street
Cleveland, Ohio 44114

Re: Donn Products, Inc. and American Metals Corp.
Cases Nos. 8-CA-9464 and 8-RC-9998

Gentlemen:

This is to inform you that the Board has concluded not to seek certiorari in the above cases. If you have any questions on this matter, please contact me at the above number.

Very truly yours,

/s/ Peter M. Godenschwager
Peter M. Godenschwager
Acting Supervisory Compliance Officer

PMG:klv

Supreme Court, U. S.
FILED
MAY 22 1980
MICHAEL RODAK, JR., CLERK

No. 79-1624

In the Supreme Court of the United States

OCTOBER TERM, 1979

LOCAL 450, UNITED FURNITURE WORKERS OF AMERICA, AFL-CIO, PETITIONER

v.

DONN PRODUCTS, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

WILLIAM A. LUBBERS
General Counsel
National Labor Relations Board
Washington, D.C. 20570

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1624

LOCAL 450, UNITED FURNITURE WORKERS OF AMERICA, AFL-CIO, PETITIONER

v.

DONN PRODUCTS, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD

---

1. The Board found that, during petitioner's (herein "the Union") organizing campaign, Donn Products, Inc. and American Metal Corp. (herein "the Company") violated Section 8(a)(1) of the National Labor Relations Act, 29 U.S.C. 158(a)(1), by granting employees binding arbitration procedures and a system of "preferred" bank loans; by promising to improve its bonus system and to provide dental insurance; by coercive interrogation; and by threatening to discharge employees, to prosecute them, to discipline them more harshly and to move its business (Pet. App. A-11 to A-12, A-41 to A-58, A-74).

The Board, reversing the Administrative Law Judge, found that the Company further violated Section 8(a)(1) by telling the employees that it intended to engage in sham bargaining if the Union were selected as the

employees' representative. This finding was based on a speech delivered two days before the election by Company President Brown, in which he "made statements that indicate he was willing to engage in a type of bargaining which amounts to no more than a show" (Pet. App. A-13 to A-14).

Finally, the Board found that the Company violated Section 8(a)(5) and (1), of the Act, 29 U.S.C. 158(a)(5) and (1), on July 9, 1975, when the Union held authorization cards from a majority of the unit employees, and by thereafter unilaterally changing working conditions and by transferring operations to a new location without consulting the Union (Pet. App. A-19, A-21 to A-22). The Board, reversing the Administrative Law Judge, issued a *Gissel* bargaining order,[1] stating (Pet. App. A-19 to A-20):

> Here, Respondent's unlawful conduct began early in the union campaign, continued through the election, and resulted in the dissipation of the Union's majority status.[2] Thus, Respondent interrogated and threatened to discharge Steyer, a member of the union organizing committee, and threatened to prosecute employee Wasik for distributing union literature in the plant. It granted benefits to employees by instituting an arbitration procedure during the campaign and by materially assisting employees to obtain personal bank loans. Finally, Respondent made repeated threats that it would engage in sham bargaining should the Union

[1]See *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575 (1969).

[2]The Union lost the representation election, which was held on September 12, 1975, by a vote of 115 to 148. The Board found that the unfair labor practices interfered with the election and set it aside (Pet. App. A-60, A-78).

> be selected, and threatened economic retaliation by closing the plant in the event the Union won the election.
>
> These unfair labor practices, directly affecting all of Respondent's employees, were intended to, and did in fact, undermine the Union's majority strength.
> * * *

2. The court of appeals upheld all of the Board's Section 8(a)(1) findings except for the sham-bargaining finding (Pet. App. A-4). Respecting the latter, the court found that the Board quoted only those portions of Brown's speech "from which an intention not to bargain in good faith might be inferred, if those statements stood alone," but failed to "quote or even mention statements which indicated that good faith bargaining would take place if the union won the upcoming election * * *." The court added that, "when, the speech is considered in its entirety, we agree with the administrative law judge that it cannot be considered an advance threat not to bargain in good faith if the Union should be certified" (Pet. App. A-5).

The court also refused to enforce the *Gissel* bargaining order because "[t]he unfair labor practices which occurred were of a kind whose effect would quickly dissipate" (Pet. App. A-8). The court pointed out that two of 288 unit employees, who worked in three separate plants, were interrogated or threatened, there were no general threats to punish employees for union activities, no one was discharged. The grants and promises of benefits "can be eliminated from a future election by a cease and desist order." Although the Company threatened to close one of its plants and subsequently did close it, the Board found that the decision to close was based on economic factors, and the Company offered—and all affected employees accepted—transfers to other nearby plants (Pet. App. A-7).

The court concluded (Pet. App. A-8 to A-9):

> If the record merely caused doubt as to the Board's reasons for ordering bargaining we would remand for further explication of its reasons. [Citations omitted.] However, though the Board gave little explanation for its decision in the present case, it is clear that the decision was determined to a large extent by the finding that there had been a threat of sham bargaining. With this violation eliminated we agree with the administrative law judge that a bargaining order was not justified. It has now been more than four years since the election was held. We believe the purposes of the Act will be best served by an early rerun election.

3. The Union's petition seeks review of the decision of the court of appeals insofar as it denied enforcement of the Board's sham bargaining finding and its *Gissel* bargaining order.

While the Board believes that substantial evidence supports its finding that the Company threatened to engage in sham bargaining and that therefore the court of appeals should have sustained that finding, the Board did not file its own petition because the court's refusal to sustain this finding presents principally an evidentiary issue, which this Court has indicated it ordinarily will not review. *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 490 (1951). In the Board's view, the court of appeals refused to enforce the bargaining order not, as petitioner states (Pet. 3, 33-34), "simply because the employer discontinued its unlawful activity during the several years between the * * * election * * * and the [court's] judgment * * *." Rather, the court found that, on this record, and particularly in light of its rejection of the sham bargaining finding, a bargaining order was not warranted.

However, should the Union's petition be granted, the Board will defend its decision and order.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

WILLIAM A. LUBBERS
General Counsel
National Labor Relations Board

MAY 1980